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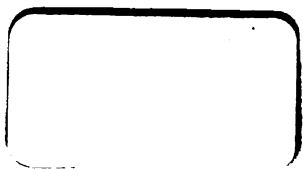
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THE NEW
✓INSTRUCTOR CLERICALIS;

STATING THE

AUTHORITY, JURISDICTION,

AND

Modern Practice

OF THE

COURT OF KING'S BENCH.

BY JOHN IMPEY,
INNER TEMPLE.

THE NINTH EDITION, CORRECTED;
WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

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TO

THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH;

LORD CHIEF JUSTICE OF HIS MAJESTY'S

COURT OF KING'S BENCH;

THE FOLLOWING WORK

IS

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It is hoped that the Ninth Edition of a Work, which from the time of its first publication has been received in the most favourable manner, will not be unacceptable to the Profession. The edition now offered to the public will be found not only to contain such cases in practice as have occurred since the publication of the last edition, but to include a variety of practical points which from accident or inadvertence had been omitted. The Index has been carefully revised, and such inaccuracies as were observed have been corrected: such as remain, the Profession are entreated to view with their accustomed candour.

Michaelmas Term,
1817.



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THE
AUTHORITY AND JURISDICTION
OF THE
COURT OF KING'S BENCH.

◆

THE *primary* objects of the law are the *establishment* of *rights*, and the *prohibition* of *wrongs*: and to accomplish the *redress* of *injuries*, courts of justice are instituted in every civil society, in order to protect the *weak* from the insults of the *strong*, by expounding and enforcing *those laws*, by which *rights* are *defined*, and *wrongs* *prohibited*. This remedy is therefore principally to be sought by application to these courts of justice, which, in all instances of an injury being committed, either inflicts a punishment on the *offender*, or gives a *recompence* to the *person injured*.

A court is defined to be a place wherein justice is duly Court defined. administered. *Co. Lit.* 58. And as, by our excellent constitution, the sole executive power of the laws is vested in the person of the king, it will follow, that all courts of justice, which are the *medium* by which he administers the laws, are derived from the power of the crown. For whether created by act of parliament, letters patent, or subsisting by prescription, (the only methods by which any court of judicature can exist,) the king's consent in the two former is expressly, and in the latter impliedly given. In all these courts, the king is supposed, in contemplation of law, to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed numerous courts, some

with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal, and by way of review.

Courts of record.

All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment, makes it instantly a court of record. *Finch's Law*, 235. *Salk.* 200. 12 *Mod.* 388. The courts of Westminster are the superior courts of the kingdom, and have a superintendence over all other courts by prohibitions, (if they exceed their jurisdiction,) on writs of error, and false judgment of their proceedings. *Carth.* 11, 12.

By the Saxon constitution only one superior court.

By the ancient *Saxon* constitution, there was only one superior court of justice in the kingdom: and that had cognizance both of *civil* and *spiritual* causes, viz. the *wittenagemote*, or general council, which assembled annually, or oftener, wherever the king kept his *Easter*, *Christmas*, or *Whitsuntide*, as yell to do private justice as to consult upon public business; but at the conquest the ecclesiastical jurisdiction was diverted into another channel. The conqueror, fearing danger from those annual parliaments, established a constant court in his own hall, called by ancient authors *aula regia*, or, *aula regis*, which was composed of the king's great officers of state, resident in his palace, and attendant on his person, assisted by certain persons, learned in the laws: all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these, in their several departments, transacted all secular business, both criminal and civil, and likewise matters of the revenue; and over all presided one special magistrate, called the *chief justiciar* or *capitalis justiciarius totius Angliæ*, who was the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and, from the plenitude of his power, grew at length obnoxious to the people, and dangerous to the government which employed him. *Spel. Gloss.* 331, 332, 333.

The court of King's Bench bound to follow the king.

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject: wherefore *King John*, who

dreaded also the power of the *justiciar*, very readily consented to that article which now forms the eleventh chapter of *magna charta*, and enacts, "*That communa placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster-hall, the place where the *aula regis* originally sat, when the king resided in that city, and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too; and a chief, with other justices of the Common Pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject.

The *aula regia* being thus stripped of a considerable branch of its jurisdiction, and the power of the *justiciar* being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of *King Henry the Third*. And in further pursuance of this example, the other several offices of the chief *justiciar* were under *Edward the First*, (who new modelled the whole frame of the judicial polity,) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and marshal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament, the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man, was thrown into so provident an order, that the great judicial officers were made to form a check upon each other, the *Court of Chancery* issuing all original writs under the great seal to the other courts; the *Common Pleas* being allowed to determine all causes between private subjects; the *Exchequer* managing the king's revenue; and the court of *King's Bench* retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown, or criminal causes.

The *aula regia* stripped of a branch of its jurisdiction.

The court of *King's Bench* is the supreme court of common law in the kingdom; and is so called, because the king used formerly to sit there in person; it consists of a *chief justice*, and *three puisne justices*, who are by their office the sovereign conservators of the peace, and

Court of K.B. is the supreme court.

supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed to do so, he did not, neither by law is he empowered to determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority. 4 *Inst.* 71, 73.

This court is a remnant of the *aula regia*.

This court is the remnant of the *aula regia*, and is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes; for which reason all process by original, issuing out of this court in the king's name is returnable, "*ubicunque fuerimus in Anglia.*"

Usually sat at Westminster.

For some centuries past it hath usually sat at *Westminster*, being an ancient palace of the crown; but this was not always the case, for we find that after *Edw. I.* had conquered *Scotland*, it actually sat at *Roxburgh*. *Hal. Hist. C. L.* 200.

Termed the *custos morum* of the realm.

It is termed the *custos morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequences (if not restrained), adapts a proper punishment to it. 2 *Haw. Pl. C.* 6 *Sid.* 168.

Peculiar jurisdiction.

It has a peculiar jurisdiction, not only over all capital offences, but also over all other misdemeanors of a public nature, tending either to a breach of the peace, or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences being manifestly against the public good, directly injure any particular person or not. 4 *Inst.* 71. 11 *Co.* 98. 2 *Haw. P. C.* 6. It has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require. 2 *Haw.* 7. Also this court by its extensive authority, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on a statute making a new law, concerning an old offence. 9 *Co.* 118. 2 *Inst.* 549. *Crompt. Juris.* 131. But before allowance of *certiorari*, the defendant must find sureties to appear and plead, and to procure the issue to be tried the next assizes, or on the next term after such *certiorari* granted, or sitting after the said term, and give due notice thereof, and appear from day to day in the said court, and not depart from thence until discharged. *Stat.* 5 *W. & M. c.* 11. and 8 & 9 *W.*

3. c. 33. And if the defendant removes the indictment he must pay costs, if convicted, to be taxed to the prosecutor within *ten days* after demand made, and refusal of payment on oath, otherwise an attachment to be granted. 5 & 6 W. & M. c. 11. 6 Mod. 246.

The jurisdiction of this court is so very high and transcendent, that it keeps all inferior jurisdictions within the bounds of *their* authority; and may either remove their proceedings to be determined here, or prohibit their progress below: it superintends all civil corporations in the kingdom, commands magistrates and others to do what their duty requires in every case, where there is no specific remedy; protects the liberty of the subject, by speedy and summary interposition; takes cognizance both of *criminal* and *civil* causes; the former in what is called the *Crown Side* or *Crown Office*; the latter of the *Plea Side* of the court. The jurisdiction of the crown side is not intended to be here treated of. But on the civil or plea side it hath an original jurisdiction and cognizance of *all actions of trespass, or other injury alledged to be committed vi et armis: of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case, which allege any falsity or fraud*; all of which savor of a criminal nature, although the action is brought for a civil remedy, and makes the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party. *Finch*, 198. The same doctrine is also extended to all actions on the case whatsoever (*except real actions*;) and has continued to do so for ages; it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and being in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury; which surmise the defendant is not at liberty to dispute. These fictions of law, on consideration, are highly beneficial and useful, especially as this maxim is ever invariably observed, *That no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.* 3 Rep. 30. 2 Roll. Rep. 502. Co. Litt. 150. 11 Rep. 55. Fictions.

This court, as it is the highest court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding, but also to punish all inferior magistrates, and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice, 2 Haw. P. C. 8. *Vaugh.* 157. *Salk.* 201. pl. 3. Highest court of common law.

Prison.

Newgate is as much the prison of this court as the King's Bench prison is; every prison in the kingdom is the prison of this court. *Rex v. Davis*, 1 Burr. 641.

Court of appeal.

It is a court of appeal, into which may be removed by writ of error, all determinations of the court of *Common Pleas*, and of all inferior courts of record in *England*. Yet even this court is not the dernier resort of the subject: for, if he be not satisfied with any determination here, he may remove it by writ of error into the court of Exchequer Chamber, *if the proceeding is by bill*, or into the House of Lords, *if by original*.

Grants a habeas corpus.

It grants an *habeas corpus* to relieve persons wrongfully imprisoned: and upon return of the cause, they may be bailed or discharged as the court shall think fit: also *mandamus's* to inferior courts to oblige them to do their duty, and prohibitions to keep them within their proper jurisdiction.

The duty of the court to correct errors of inferior jurisdictions.

It is the duty of this court to correct the errors of inferior jurisdictions, and to grant a *mandamus* where it suspects on strong grounds that injustice has been done below, in cases where a *mandamus* lies. 6 *Term Rep.* 104. *Rex v. Chan. of the Un. of Cambr.*

This court cannot hold plea for a less sum than 40s.

As the inferior courts, which are not of record, regularly cannot hold plea of debt, &c. or damages, but under 40s. so the superior, that are of record, cannot hold plea of debt, &c. or damages, *regularly*, unless the sum *amount to 40s. or above*. 2 *Inst.* 311. Stat. 6 Ed. 1. c. 8. which enacts, "*That none shall have writs of trespass before justices, unless he swear by his faith, that the goods taken away were worth 40s.*" For the wisdom of the common law was, that men should not be troubled for suits of small value in the king's courts, there being *inferior jurisdictions* established, in order to bring justice home to every man's door. 2 *Inst.* 311. *Ne dignitus curiarum illarum vilesceret, & ne materiam superaret opus.*

In case the debt appears by the declaration to be for a less sum than 40s. on the oath of defendant, contradicted by the plaintiff, court will stay the proceeding.

This court, in conformity to determinations in the Exchequer and Common Pleas, will stay the proceedings in an action where the demand does *not* amount to 40s. on the oath of the defendant, and contradicted by the plaintiff; although the demand of the plaintiff *appear to be more* than 40s. by his declaration. *Kennard v. Jones*, 4 *Term Rep.* 495. *M. 32 Geo. 3. Wellington v. Arters*, 5 *Term Rep.* 64. *M. 33 Geo. 3. S. P. vide Stean v. Holmes*, 2 *Black. Rep.* 754. Mr. Justice Buller in the case of *Kennard v. Jones*, states, that the practice had been *not to grant such rules in this court*, unless the demand appeared to be under 40s. on the record. And this appears in the case

of *Oulton and Perry*, 3 Burr. 1592. For the court there said, they could not try the *quantum* upon affidavit. The distinction is, where it appears on the face of the declaration, or not.

If a cause has been removed from an inferior court, this court will grant a *procedendo* if the debt or damages appear to be under 40s. *Brownl. Brev. Judg.* 140. 2 *Brown* 82. *Moyle* 69. But in an action for an assault brought against excise officers, the court refused to quash a *certiorari*, the damages being under 40s. because it appeared that defendant could not have an impartial trial in the inferior court. *Daniel v. Philips*, 4 Term Rep. 499.

So, if the cause be removed from an inferior court.

Assault against excise officers.

By stat. 43 Eliz. c. 6. it is enacted, "that if any personal action be brought in any of her majesty's courts at Westminster, (not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery,) it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, shall not amount to the sum of 40s. that in every such case the judges or justices before whom such action shall be pursued, shall not award the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to; but less at their discretion."

No more costs than damages if recovery amount to less than 40s.

If upon a nonsuit in an inferior court, 16s. is given for costs, by 23 H. 8. c. 15. debt lies for it in this court, because given by a subsequent statute to the statute of Gloucester. *Cro. Eliz.* 96. *Leon.* 316.

Debt lies under 40s. on nonsuit.

By stat. 43 Geo. 3. c. 46. sect. 4. where any action shall be brought in England or Ireland after the first of June, 1803, upon any judgment recovered, or which shall be recovered in any court in England or Ireland, the plaintiff or plaintiffs in such action on the judgment shall not recover or be entitled to any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of some court, shall otherwise order.

In actions on judgments, plaintiffs shall not be entitled to costs, unless ordered.

This clause is holden to extend only to judgments recovered by plaintiffs, and not to judgments of nonsuit. 14 East. 344.

The style of the court is, "Pleas before our lord the king at Westminster, of the term of Saint Hilary, in the 57th year of the reign of our sovereign lord George the third, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the faith — And in the year of our Lord 1817."

Style of the court.

Two ways of proceeding in this court. In this court, there are two ways of proceeding, *viz.* by *special original writ*, or by *bill*; the former is generally used in case the *debt* is large, because the defendant, if he means to delay execution of the judgment, must bring his writ of error *returnable in parliament*, which greatly enhances the expence; but the latter is the more expeditious.

If privilege. If the party is privileged as an attorney, this court holds plea on a *writ of privilege*, which is the first process issued against the defendant, to compel him to appear and make his defence.

Attornies, &c. If *attornies*, *officers* or *ministers* of this court, are sued by persons *not* entitled to privilege, they must be sued by *bill*, which expresses either the grievance or wrong which the plaintiff hath suffered by the defendant, or some fault by him committed against some law or statute of the realm.

Peers are to be sued by original. Peers are now to be sued by original writ in this court. See the case of the *Earl of Lonsdale v. Littledale* in error, 2 *H. Blacks. Rep.* 299. and a summons is to issue in that county where he resides.—But if the *venue* be laid in a *different county*, then a *testatum* summons must be made out in that county where he resides. By stat. 39 and 40 *Geo. 3. c. 67*, being the act of union, the *lords of parliament on the part of Ireland, in the house of lords of the united kingdom*, shall at all times have the same *privileges of parliament* which shall belong to the *lords of parliament on the part of Great Britain*. Art. 4. Therefore they are to be sued also by *original writ*.

Peers of Ireland.

Members, &c. Also a *knight*, *citizen*, or *burgess*, or other person entitled to privilege of parliament, may be sued in this court by *original writ*, or by *original bill* and summons, in manner as directed by the stat. 12 and 13 *Will. 3. c. 3.* upon which, a writ of *summons* and *distringas* issue to compel his appearance: but no such *writ of summons* will lie against a person *not entitled to privilege*, on a bill filed against him in this court; though many have attempted that mode of proceeding, which has been set aside with costs. *Whitworth v. Richardson*, *H. 23 Geo. 3. Tidd.* 315.

If a member be in the King's Bench prison. But if a member of parliament be in the King's Bench prison, the plaintiff may file a bill against him as being in custody of the marshal; but he cannot be charged in custody in a bailable action. *Jackson against Mackreth*, 5 *Term Rep.* 361.

As to members who are in trade, see the act 45 *Geo. 3. c. 124. sect. 1, 2, 3*, as to proceeding against them.

ACTIONS.

It has been already observed that, the more effectually to accomplish the redress of private injuries, courts of justice were instituted in every civilized society, in order to *protect* the *weak* from the insults of the *strong*. The remedy therefore principally to be sought for by application to these courts of justice is by *civil action*, which is the form of a suit given by law, for the recovery of that which is due to the person applying, and invented to preserve men's persons and properties from the violence and injustice of others; whereby the suitors are obliged to submit to the public the measure of their damages; for were they allowed to be their own carvers, or to make reprisals, which they might do in the state of nature, such permission would introduce all that inconvenience which the state of nature did endure, and which government was at first invented to prevent.

In every action that is brought, the person complaining is called the *plaintiff*; and the person who is required to make satisfaction, is called the *defendant*.

As every wrong may be considered as merely a privation of right, the natural remedy for every species of wrong is the being in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or where that is not possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages: as in case of assault, breach of contract, &c. to which damages the party injured has acquired an *incomplete*, or *inchoate right*, the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained, (which are sometimes considered in the light of the remedy itself,) are a diversity of *suits* and *actions*, which are defined by the Mirror to be, "*the lawful demand of one's right*," or *jus sequenti in judicio quod alicui debetur*. Remedy for wrongs is by action.

There is a great diversity between a *writ* and an *action*; the *action* is the right of a suit, and the *writ* is grounded thereupon, and the means to bring the plaintiff to his right. Diversity between a writ and action.

Actions divided.

Actions are divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas, *Co. Litt.* 284, b. and these latter are again divided into *real*, *personal*, and *mixed actions*. In a *real* action the proceedings are *in rem*, for the recovery of real property only; in a *personal* action, they are *in personam*, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a *mixed* action they are *in rem et personam* for the recovery of real property and damages for withholding it.

Penal or popular actions.

Action is also said to be either *penal* or *popular*. The *popular* or *penal*, is an action which lieth for a penalty given upon the breach of some penal statute, which every man may sue for *himself* and *the king*, or *to the poor*, or to *some public use*, and the other part to the informer, or prosecutor: and then the suit is called a *qui tam* action, because it is brought by a person, *qui tam pro domino rege, &c. quam pro seipso in hac parte sequitur*. If the king commences the suit, he shall have the whole forfeiture. But if any *one* hath begun a *qui tam* or *popular* action, no other person can pursue it: and the verdict passed upon the defendant in the *first* suit, is a bar to all others, and *conclusive* even to the king himself. *2 Haw. P. C.* 268, and *4 H. 7. c.* 20. enacts, *that no recovery (otherwise than by verdict,) obtained by collusion in an action popular, shall be a bar to any other action prosecuted bona fide*. But without such penalty be given to the informer, no person can sue, for the whole goes to the king. *Ib.* 265.

Verdict in such action.

Power by statute must be given a common informer to sue.

A common informer can have no right to sue for any penalty, but where power is given to him for that purpose by the statute. *Fleming qui tam v. Baily*, 5 East. 315.

The writ first sued to be preferred.

When different writs are sued out by different common informers, the first *sued out*, and not the *first served*, shall have the preference. *3 Bur. Rep.* 1423. *Combe v. Pitt*.

As to affidavit before action brought.

The *2i Jac.* 1. c. 4. s. 3. enacts, that no officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration upon penal statutes, until the informer hath *first* taken oath, before some of the judges of that court, that the offence was *not committed in any other county*, than where by the said information, &c. the same is supposed to have been, and that he believes the offence was committed *within a year* before the information, &c. within the same county.

To what it does not extend.

This act is held not to extend to *subsequent* statutes, as the statute of usury. *12 Ann.* 15 Car. 2. *Salk.* 373, 374, *2 Str.* 1081. *French qui tam v. Coron*.

In a penal action on the stat. 25 Ed. 3. st. 4. c. 3, the court in a very early stage of the cause, staid the proceedings on motion, for want of the affidavit, that the offence was committed within the county where the action was brought, or within a year before the bringing of it, 2 Term Rep. 274. *White qui tam v. Boot*. But where application was made after verdict in an action for non-residence, the court refused to stay the proceedings. 3 Term Rep. 363. *Leigh qui tam v. Kent*.

This statute does not control any of those statutes on which penal actions are to be brought in the superior courts; but applies to those only, on which proceedings may, and ought to be had before justices of assize, or nisi prius, &c. *Ibid*.

The defendant cannot assign the want of the affidavit prescribed for error, *Cro. Car.* 316. pl. 8, nor can it be pleaded, *Freeman*, 376, 3 Keb. 363. *Garret v. Baskerville*; for it is only directory to the officer.

There is also an action at the suit of the party grieved, which is given by statutes, as 13 Ed. 1. c. 1. and 9 Geo. 1. c. 22. and others, whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party is here bound, by the fundamental contract of society, to obey the directions of the legislature, and pay the forfeiture incurred as the law requires, in order to make satisfaction in damages to all persons who have suffered by the offences enumerated.

He that sues in an action real for title of land, is called the demandant; and he that is sued, is called the tenant.

In every other action, the person complaining is called the plaintiff, and the person who is called upon to make satisfaction is called the defendant.

If two actions be brought by the same plaintiff at the same time, for causes which may be joined, and the defendant is holden to bail in both, the court will compel the plaintiff to consolidate them, and pay the costs of the application. *Cecil v. Briggs*, 2 Term Rep. 639.

Where a wrong is *ex maleficio*, it dies with the person; but where it is *ex contractu*, it does not. *March Rep.* 14.

In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant; as trespass, battery, and slander; the rule is, that *actio personalis moritur cum persona*: and it never shall be revived either by or against the executors or administrators. 3 Black. Com. 302. 4 Inst. 315. For neither the

Penal actions: court will stay proceedings.

Action at the suit of the party grieved.

In real actions names of the parties. Personal.

When court will compel actions to be consolidated.

What actions die with the person.

In trespass, battery, &c. the action dies with the person.

executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any wrong or injury. But there are some exceptions to this rule, chiefly arising from an equitable construction of the stat. 4 Ed. 3. c. 7, by which executors shall have an action of trespass, for a wrong done to their testator. See 2 Bac. Abr. 444. 5 Cow. Rep. 375.

Civil actions divided.

Civil actions are again divided into *real*, *personal*, and *mixed*. *Real*, which concern real property only, are such whereby the plaintiff, or demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life: but these actions are now generally laid aside, being very dilatory and expensive; and a more commodious method is contrived to dispute the title of lands, called an ejectment. *Co. Litt.* 284. 2 *Inst.* 40.

Actions on contract.

Actions upon contract are, *account*, *annuity*, *scire facias*, *assumpsit*, *covenant*, and *debt*.

Account.

By the common law *account* lay only against a guardian in *socage*, *bailiff*, or *receiver*, to compel an account of profits or monies received by defendant. *Co. Litt.* 172, a. And by the statute 4 & 5 Anne, c. 16. s. 27. it may be maintained against the executors and administrators of every guardian, bailiff, and also by one joint-tenant and tenant in common, his executors and administrators, against the other as *bailiff*, for receiving more than comes to his just share or proportion, and against his executors and administrators. This action is in a great measure out of use; but, however, it is still the proper remedy for investigating and settling long and intricate running accounts, unless recourse be had to a court of equity: it being held that an action of *assumpsit* cannot be maintained on a running account between a merchant and his broker. *Scott v. M'Intosh*, 2 *Campb.* 238.

Annuity.

Annuity is an action which lies for the recovery of an annuity, or yearly payment of a certain sum of money granted to another in fee, for life or years, charging the person of the grantor only; and it may be brought by the grantee or his heirs, or his or their grantee against the grantor or his heirs. *Co. Litt.* 144, b. This action is at present out of use, being superseded by the action of *debt* or *covenant*.

Scire facias.

Scire facias lies by or against the parties, or their representatives, to have execution on a judgment, statute, or recognizance for the sum recovered or acknowledged to be due.

Assumpsit is a form of action which the law gives to a party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either *express* or *implied* by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 Co. 92. *Moor*, 667. But here it must be observed, that the law distinguishes between a *general indebitatus assumpsit*, and a *special assumpsit*; for though they come under the denomination of actions on the case, yet the first seems to be of a superior nature, and will lie in no case, but where debt will lie. 2 *Ld. Raym.* 1034. *Doug.* 1. *Walker v. Whilter*. But for a particular undertaking, or collateral promise to discharge the debt or duty of another, a special assumpsit must be brought. 1 *Bacon Abr.* 163.

Assumpsit lies in many cases where debt lies, and in many where debt doth not lie. 2 *Burr.* 1008.

Implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law; which extends to all presumptive undertakings and assumpsits; which, though never perhaps actually made, yet constantly arise upon this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this *implied assumpsit*; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merits. This is called an *assumpsit*, on a *quantum meruit*. There is also an implied *assumpsit*, (a) or a *quantum valebant*, which is very similar to the former: being only where one takes goods or wares of a trades-

(a) It is immaterial, for goods sold, &c. whether a *quantum meruit* or a *quantum valebant* be introduced; though upon the whole it seems that in every case a *quantum meruit* is preferable.

man, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Money had
and received.

Another species of *implied assumpsit* is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part: for the law constitutes this to be money had and received for the use of the owner only; and *implies*, that *the person so receiving promised and undertook to account for it to the true proprietor*. And if he *unjustly detains it*, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is applicable to almost every case where the defendant has received money, which *ex æquo et bono* he ought to refund. 2 *Burr.* 1012. *Moses v. Macfarlan.* (a)

Covenants.

Covenant is for the recovery of damages, upon contracts by deed. This action is founded upon articles of agreement, awards, charter parties of affreightment, policies of insurance, indentures of apprenticeship, leases, mortgages; and is either for non-payment of money, or for not doing, or forbearing some other act.

Debt, in what
case it lies.

Debt lies for the recovery of a *sum certain upon judgments, statutes, recognizances, specialities, and simple contracts, express or implied*; or is founded in *maleficio*, as for escapes, or upon acts of parliament, by the party grieved, or common informers.

Foreign judgment.

Debt lies on a foreign judgment, and the plaintiff need not shew the ground of the judgment. *Dougl.* 1. *Walker v. Whitter.* Sed vide 9 *East.* 194.

Penalty by
act of parliament or bye-law.

It lies for a penalty given by an act of parliament, for the penalty of a bye-law; though it is not said by what action it shall be recovered, 1 *Roll.* 599. l. 25. For a fine or amercement in the court baron. 3 *Lev.* 261. So for a fine upon an admittance to a copyhold. 1 *Sid.* 58. 2 *Mod.* 230. 3 *Mod.* 340. *Hard.* 487. So for fees given by a statute to a sheriff. *Mo.* 583. 1 *Salk.* 209.

(a) The nature of this action is fully treated of, and the several cases determined are stated in my *Mod. Pleader*, 2 Ed. 148.

Debt may be maintained by the payee of a bill of exchange against the drawer, but not against the acceptor. *On a bill of exchange, or note.* 1 Salk. 23. Debt also may be maintained by the payee of a promissory note against the maker, but cannot be maintained on a promissory note payable by instalments, till the last day of payment be past. *Rudder v. Price*, 1 H. Black. Rep. 447.

Actions for wrongs are, *case*, *detinue*, *replevin*, and *trespass vi et armis*.

Actions on the case, are founded on common or statute Case: law, and lie for the recovery of damages for consequential wrongs, or torts to persons individually, or relatively, or to real or personal property, or some right or privilege incident thereto. The actions are either *ex delicto*, or *quasi ex contractu*, and are said to arise from malfeasance, or doing what the defendant ought not to do; non-feasance, or not doing what he ought to do; and misfeasance, for doing what he ought to do improperly: and they are commonly for doing or omitting something contrary to the general obligation of law, the particular rights or duties of the parties, or some implied contract between them. To persons individually, *ex delicto*, they are for consequential hurt or damage, arising from public nuisances, or keeping mischievous animals; in nature of conspiracy, for malicious prosecutions, or civil suits, or criminal charges, libels, scandalum magnatum, or defamations of common persons; against justices or other officers for refusing bail, &c. or *quasi ex contractu*, against surgeons, &c. for improper treatment; to persons relatively, *ex delicto*, for enticing away or harbouring wives, or servants *per quod*, &c. To real property, corporeal, *ex delicto*, for nuisances of a private nature to houses, lands, &c. to the prejudice of the plaintiff's possession or reversion; or on the riot or black act, or *quasi ex contractu*, against tenants in nature of waste, for not repairing fences, or for not carrying away tithes. To real, incorporeal, *ex delicto*, for disturbance of common pasture, &c. ways, offices, franchises, tolls, ferries, and seats in churches. To property, *ex delicto*, they are actions of *trover*, and conversion for negligence, in riding horses, driving carriages, navigating vessels, or performing works. Against sheriffs or other officers for escapes, false returns, or taking insufficient pledges, &c. for excessive or irregular distress for rent, or damage feasant, rescue of prisoners, unlawfully exercising trades, or infringing

patents, copyrights, &c.; false and deceitful representations; or on the statute of hue and cry, &c. or *quasi ex contractu*, for deceit on sale of cattle, or goods, or immoderate use of them, when lent or let to hire, and against inn-keepers, carriers by land or by water, wharfingers, farriers, &c.

Detinue. Detinue lies upon a purchase, bailment, or finding for the recovery of goods in *specie*, or damages for detaining them.

Replevin. Replevin lies to recover damages for an immediate wrong without force, in taking and detaining cattle or goods under a distress for rent, or damage feasant, &c. and answers to the action of trespass, *de bonis asportatis*.

Trespass. Trespass *vi et armis*, lies to recover damages for immediate wrongs, accompanied with force to *persons* by menaces, assault, battery, wounding, maim, or false imprisonment; to *real* property, as houses, lands, fisheries or watercourses; and to *personal* property, by destroying, damaging, taking away, detaining, or converting cattle or goods.

FOR WHOM AND AGAINST WHOM AN ACTION WILL LIE.

As the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action, except on account of their *crimes* or their *country*: as men *attainted of treason or felony*, persons *outlawed or excommunicated*, convict in *præmunire*, *alien enemies*, *professed in orders of the papal religion*, as *friars, monks, &c.* (unless they have attained a pardon,) *infants*, *feme covert*s (unless by special custom,) or persons not in *rerum natura*; but executors or persons outlawed have a right to sue in right of their testator or intestate. 1 *Inst.* 128.

Care must be taken how actions are brought.

But care must be taken how such actions are brought; as if an infant is plaintiff, he must sue by his next friend or guardian (*Roll. Abr.* 287), unless he sues with others as executor, and then he may sue by attorney, for all of them together represent the testator, *Ibid.* 288. If an infant is sued, he must appear by a guardian; if not, the plaintiff may move the court to have one appointed.

2 *Inst.* 26. If an infant recovers by *verdict*, or *judgment goes by default*, where he is plaintiff, it cannot be assigned for error, *that he is an infant*; but the defendant should have *summoned* to stay the proceeding until a guardian was appointed. *Vide* 21 *Jac.* 1. c. 13. 4 *Ann.* c. 16. If an idiot sue or be sued, he must do it in person. *Co. Litt.* 135, b.

By marriage the husband and wife are one person in Baron and law. *Co. Litt.* 112. (and the husband is bound to provide *feme.* her with necessaries; and if she contracts debts for them, he is obliged to pay them.) 1 *Salk.* 118. If she *elopes* with another man, he is *not* chargeable even for necessaries, at least if the person who furnishes them is apprized of it. 1 *Lev.* 5. If she is indebted *before* marriage, he is bound. 1 *Leon.* 312. and he cannot be sued *alone* for the debt of his *wife* contracted *before* marriage. *Hitchinson v. Hewson*, 7 *Term Rep.* 348. She must in all cases sue with her husband: and in all cases where they are *both* sued (although the husband may answer alone,) yet the wife shall never be forced to answer *without* her husband (except it be a sole merchant, *i. e.* when she carries on a sole and separate trade, which is by the custom of *London* only) 10 *Mod.* 6. 1 *Inst.* 135. But she cannot *sue as a sole trader without her husband* in the superior courts, 4 *Term Rep.* 361. *Caudell v. Shaw, Beard and ux. v. Webb et al. in error.* 2 *Bosanq. and Pull.* 93. Wherever the suit will survive to the wife, *she* must join in the action. 1 *Wils.* 224. *Dunstan v. Burwell.* Or where the debt is due to the *feme dum sola*, *both* must join, *Moof*, 422. If baron is possessed of tithes in right of the *feme*, they must join in debt for not setting them forth, because the *feme* is the proprietor. *Cro. Eliz.* 608. 613. If the action is brought *for the labour of the wife only*, she may join in the action. 2 *Sid.* 128. *Cro. Jac.* 77. But declaration must state it to be done by the wife. 2 *Wils.* 424. *Cro. Jac.* 77. The dippers at Tunbridge Wells all joined with their husbands, and held well. 2 *Wils.* 414. *Weller and ux. and others, v. Baker.* If a bond be given to *baron* and *feme* administratrix, the husband *alone* may bring the action, and declare on it as on a bond made to himself. 4 *Term Rep.* 616. *Ankerstein v. Clarke.*

In the case of *Marshall v. Rutton*, *E. 40 Geo.* 3. this *Feme* living court determined that a *feme covert*, living apart from her husband, having a separate maintenance secured to her by deed, cannot contract and be *sued as a feme sole*. 8 *Term Rep.* 645.

If she commits adultery. A husband is *not* bound to receive, nor is he liable to pay for necessities found to his wife, after she has committed adultery, though he has before committed adultery himself, and turned her out of doors without any imputation on her conduct. *Govier v. Hancock*, 6 Term Rep. 603. But if she has committed adultery, and he leaves her in his house, with two children bearing his name, without making any provision for her in consequence of the separation, and she continued in a state of adultery, the husband is liable for necessities furnished to her, unless it appear that the plaintiff knew, or ought to have known, the circumstances under which she was living. *Norton v. Fazan*, 1 Bosanq. and Puller, 226.

But if she does, and husband leaves her in his house with two children, and continues in a state of adultery.

If husband resides abroad. If the husband resides abroad, and the wife trade and obtain credit in this country as a *feme sole*, she is liable for her own debts. *De Gaillon v. Victorie Hariet l'Aigle*, 1 B. and P. 357.

If husband has abjured the realm or is banished.

There is one case where the wife shall sue and be sued as a *feme sole*, where the husband has abjured the realm, or is banished, *Co. Litt.* 133. for then he is dead in law; and the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all.

Executors.

Executors, when they bring an action, must *all* be named, although probate be granted to *one* only. 9 Co. 37. 1 Sid. 449. But when an action is brought against them it must be *only against such of them as do administer*. 1 Roll Abr. 924. Carth. 124. If there be two executors, one under age, and the other proves the will, and hath administration *durante minore*, &c. he may sue solely. But where both are of full age, though the will be proved by one only, the action must be brought in *both* their names. 2 Lev. 240. *Colborne v. Wright*. 2 Jon. 119. Raym. 198.

Joint-tenants.

Also, if two men have lands and goods together in joint-tenancy, and be wronged in them, they must sue jointly. *Co. Litt.* 180. Tenants in common ought to join in actions personal, but not real; and in slander of title, they ought to sever. Divers persons may have an action of trespass jointly for goods taken or the like; but of battery, or such personal trespass, the action ought to be single. If one trespass be done by divers, the plaintiff may make it *joint*, or *several*, as he pleases; and yet two that join in a trespass, do so make one trespasser, *that* one of them is answerable for the other; and if they be sued in one action, they may sever in

Tenants in common.

pleas and issues, and a release to one is a release to all. Release. *Hobb.* 66. Also the jury must assess damages for all, but there shall be but one satisfaction; and where a joint action doth lie against several persons, and some of their names are *known*, and some are *not*, the action may be brought against them that are known by their particular names; and you may declare against them *simul cum aliis*, &c. *Comb.* 260.

WITHIN WHAT TIME ACTIONS ARE TO BE BROUGHT.

The *limitation of suits* is founded in public convenience; and attended with so much utility, that courts of equity adopt the statutes made for that purpose, as a positive rule; and apply it by parity of reason, to cases not within it. *2 Burr.* 961. *Johnson v. Smith.*

By the 32 *H. 8. c. 2.* "No person shall have a writ of right of the possession of his ancestor, but within *sixty years*, nor of his own, but within *thirty years* before the teste of the original."

In all actions which are of the nature of a writ of right, in which the demandant must count of a seisin, and recover any hereditament, he shall be barred, if his ancestor had not seisin within *sixty years*. *Bro. Abr. on Stat. Lim.* 16.33.

All *formedons* in reverter or remainder shall be sued in *Formedon* in *fifty years* after title or cause of action fallen, and not reverter. after. 32 *H. 8. c. 2.*

And by stat. 21 *Jac. 1.* "All writs of *formedon* in Writs of
" *descender*, *remainder*, or *reverter*, shall be sued within *formedon* in
" *twenty years* next after the title or cause of action *descender*
" first descended or fallen, with a proviso, that if the *within 20*
" person entitled to such writ be at the time of the said *years.*
" right first descended or fallen, within twenty-one years
" *feme covert*, *non compos mentis*, imprisoned, or beyond
" the seas, then such person and his heirs may, not-
" withstanding the said twenty years be expired, bring
" his action, or make his entry as he might have done
" before this act; so as such person, or his heir shall,
" within *ten years* next after his full age, discovery, &c.
" &c. take benefit of, and sue forth the same; and at
" no time after the said *ten years.*"

An ejectment must be brought within 20 years. *Sid. Ejectment* 433. *Bull.* 102.

If a fine.

In case of a *fine*, there must be an actual entry *within five years*; and that the confession of an entry to deliver a lease in ejectment, shall not operate to avoid a fine. 2 *Str.* 1086. *Hil. 2 Ann.* by all the judges (except one.) *Berrington v. Parkhurst.*

No person to make an entry into lands but within 20 years next after title of entry.

No person shall make entry into any lands, &c. but in 20 years next after his title of entry, which shall first accrue to the same; and in default thereof, such person so not entering, and his heirs, shall be utterly disabled from such entry. 21 *Jac.* 1. c. 16.

In ejectment for mines, plaintiff proving himself lord of the manor, and in possession of it, does not avoid the statute of limitations, if defendant has been in possession of the mines 20 years; for they are distinct possessions, and may be different inheritances. *Rich v. Johnson*, 2 *Str.* 1142.

No entry or claim, &c. unless action prosecuted.

And by the stat. 4 *Ann.* c. 16. No entry or claim shall be sufficient unless an action be prosecuted within a year after. And it must be made upon the land, unless prevented by a special cause. 1 *Salk.* 285. *Mod. Cas.* 44.

Joint-tenant.

A joint-tenant is not barred by non entry in 20 years, if his companion was in possession. *Ibid.* Nor one parcener who has the whole of the devise, where the other parcener takes the profits. *Salk.* 423.

No fine or recovery to be reversed, unless error be brought in 20 years.

No *fine*, common recovery, or judgment, in action real or personal, shall be reversed for any error or defect, unless error be commenced and prosecuted with effect within 20 years after such fine levied, recovery suffered, or judgment signed, or entered upon record. 4 *Ann.* c. 16.

Reversioner cannot have error.

A reversioner cannot have error after 20 years, though his title did not accrue till after the expiration of them; and though error is brought in less than 20 years after the commencement of his title. *Loyd v. Vaughan*, 2 *Str.* 1257.

Penal statutes.

By 31 *Eliz.* c. 5. "All actions, &c. brought for any forfeitures on any penal statute made, whereby the forfeiture is limited to the queen, shall be brought within *two years*; and all actions upon any penal statute, the benefit whereof is limited to the king and to the prosecutor, shall be brought within *one year*; and in default such pursuit, then to be brought for the queen, within *two years* after that year ended. And if any suit shall be brought after the time in that behalf before limited

" (except on the statute of tillage,) the same shall be void."

In case the penalty be given to an *informer alone*, If to an *informer* he must commence his action within *one year*. *Bull. N. former only*. P. 195. 1 *Ld Ray*. 78. *Lookup v. Sir T. Frederick*. But this statute does not extend to actions brought by the Party grieved. *party grieved*. 4 *Mod*. 129. *Comb*. 194.

A *latitat* is a good commencement of a penal action. *Latitat*. *Bridges qui tam v. Knapton*, H. 22 Geo. 2. and the *true time of taking out the writ* may be shewn, notwithstanding the *teste*.

By 21 *Jac*. 1. c. 16. "Actions for words shall be Words. commenced and sued within *two years* next after the words spoken, &c."

N. B. This doth not extend to *scandalum magnatum*, Doth not extend to cases where the *special damage* is the gist of tend to scandal the action; but where the words of themselves are *mag. actionable*, special damage will not take them out of the statute. 1 *Sid*. 95.

§ 3. "All actions of *trespass*, of *assault*, *battery*, *Trespass*, as *wounding*, *imprisonment*, or any of them, shall be *sault*, &c. commenced within *four years* next after the cause of such actions or suits."

If trespass be brought for beating a servant, *per quod* What action *servitium amisit*, this is not such an action as is within the not within the statute, being founded on the special damage. *Salk*. 206. *statute*. So for *crim. con*. The plea is not *guilty within six years*. 2 *Bur*. 753. *Cooke v. Sayer*.

"All actions of trespass, *quare clausum fregit*, actions of *Trespass* *trespass, delinque, trover*, (a) and *replevin* for taking away *quare clausum* of goods and chattels; actions of *account* (other than *fregit* such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants); (b) actions on the case (except slander;) actions

(a) 3 Co. 246, 338.

(b) The exception as to merchants accounts is only What the meant to prevent dividing a running account, but ex-exception extends not to accounts closed and concluded. 2 *Ves*. tends to. 400. *Welford v. Liddale*.

It does not extend to accounts *current* between mer- Not to accountant and merchant. 1 *Lev*. 287. 2 *Mod*. 312. *Vide* counts current. 1 *Vent*. 90. 1 *Sid*. 465. 6 *Term Rep*. 189.

" of *debt*, grounded upon any lending or contract without
 " specialty, *debt* for arrearages of *rent*, are to be brought
 " within *six years next after the cause of action*." Ibid.

Action by an
 infant, &c.

No persons entitled to *trespass*, *detinue*, *trover*, *replevin*, *account*, *debt*, *trespass* for *assault*, *menace*, *battery*, *wounding*, or *imprisonment*, or *action on the case for words*, shall be disabled from such actions by being at the time of such cause of action accrued *under age*, *covert*, *noncompos*, *in prison*, or *beyond seas*, so as they take the same within the times by the said statute limited after *coming of age*, being *discovert*, of *sane memory*, at *large*, or *returned from beyond seas*. 21 Jac. 1. c. 16.

Seamen.

Nor by stat. 4 Ann. c. 16. Any person entitled to suit for seaman's wages, &c.

Ireland.

And if the plaintiff was in *Ireland*, that shall be *ultra mare* within this statute. *Sho.* 91.

So all actions on the case are within the benefit of this proviso. 2 Saund. 120. 2 Mod. 72.

They are at liberty by the statutes to bring the action within the same time after return, &c. as was limited for such action.

Or brought
 within a year
 after judg-
 ment or out-
 lawry reversed.

By stat. 21 Jac. 1. c. 16. If judgment for the plaintiff be reversed, or arrested after verdict, and the defendant therein be outlawed, and shall after reverse the outlawry, the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action *within a year after such judgment reversed*, or such judgment given against the *plaintiff*, or *outlawry reversed*, and not after. § 4.

If plaintiff dies
 executor's
 right of action.

So if an action was commenced *within six years*, and the plaintiff dies, his executors, &c. may commence a new action, though six years are past, and shew the special matter. *Salk.* 425. *Fitzgib.* 171.

Probate.

If the grant of a probate or administration be delayed, it must be shewn. *Fitz.* 170, 289.

Acknowledg-
 ment of debt.

If a man *after six years* promises payment, or publishes that his debts will be paid, or even acknowledges the debt, it will be out of the statute. *Pr. Chan.* 386. 2 Saund. 64, a.

What actions
 are not within
 the statutes.

Debt on 2 Edw. 6. for tithes, on an award, for a fine of a copyholder, covenant, debt or *specialty*, or other matter of a *higher nature*, or for an escape, are not within

the *stat.* 1 *Sid.* 305. 1 *Saund.* 33, 37. 1 *Lev.* 273. Nor can it be pleaded by any sheriff to an action brought against him for money levied on a *fieri facias*, because the action is founded in *maleficio*, as also upon the judgment on which the *fieri facias* issued, which is a matter of record. 1 *Mod.* 205, 212. A charity is not barred by length of time. 2 *Vern.* 399. A legacy is not within the statute, 1 *Vern.* 256. nor a mortgage. 1 *Chan. Cas.* 102.

If the plaintiff be in *England at the time the cause of action accrues*, though he afterwards go abroad, the time of limitation begins to run: so that if he, or (if he dies abroad) his executor or administrator, do not sue *within six years*, they are barred by the statute. *Smith, Exec. v. Hill, Executor*, 1 *Wils.* 135. N. B. The stat. extends to persons in *Scotland*. 1 *Black. Rep.* 186.

If the plaintiff is a foreigner and does not come to *England* in 50 years, he still hath *six years* after his coming into *England*, to bring his action, and if he never comes to *England* himself, he has always a right of action *while he lives abroad*, and so have his executors or administrators after his death. *Strithorst v. Groome*, 3 *Wils.* 145. While any of the disabilities mentioned in the statute limitations continue, the party may, but is not obliged to commence his action: the statute doth not run while any of those disabilities continue.

If one of the plaintiffs be abroad, and the others in *England*, the action must be brought *within six years* after the cause of action arises. *Perry et al. v. Jackson et al.* 4 *Term Rep.* 516. The statute cannot be a bar in any case, unless the time of limitation is expired, after there hath been a complete cause of action. 1 *Black. Rep.* 354. 1 *H. Black.* 631. 2 *Ld. Ray.* 838.

By 3 & 4 *Ann. c. 9.* Actions on promissory notes shall be brought *within the time* appointed for actions upon the *prom. notes case*. And by *c. 16.* all suits in the admiralty for seamen's wages shall be commenced within *six years* after the cause of action.

In the case of *justices of peace*, or *constables* acting under their warrants, the *stat. 24 Geo. 2. c. 24.* enacts, "That actions against them shall be commenced *within six calendar months* after the offence committed, or the plaintiff shall be barred." For proceedings against them, *vide* title *Justices and Constables*.

Acknowledgment of the debt.

A bare acknowledgment, and that of the slightest nature, is now deemed sufficient to prevent the operation of the statute. See 4 *East*. 599. *Dougl. Rep.* 652, 3. 2 *H. Black.* 340. 2 *Term Rep.* 760. 6 *Term Rep.* 189. And one *item* of a mutual running account, happening within six years, takes the case out of the statute. 6 *Term Rep.* 189. *Calling against Skoulding.*

Commencement of the action.

When an action is limited by a statute to be commenced within a certain time, a *bill of Middlesex*, or *latitat* sued out within that time, may be produced in evidence, at the trial, to prove that the action was commenced in due time. But if the writ was *not* sued out till *after* the time, though by relation it would be *within* the time, the plaintiff ought to be nonsuited. *Bull. Nisi Prius*, 135. 3 *Burr.* 1243.

But against privileged persons.

But against *privileged persons*, as attornies, or officers of the court, or a prisoner in the actual custody of the marshal, the statute can only be avoided by filing a bill, which now may be filed in vacation, as well as in term. 5 *Term Rep.* 173, 325. *Dougl.* 313.

So against members of the House of Commons, if proceeded against by bill.

In actions against *peers*, corporations or hundredors, an *original* must be sued out, and returned by the sheriff.

The plaintiff may shew the *true* commencement of an action, contrary to the fiction, even in penal actions; and if there be *no* special memorandum, he may shew *by the writ*, this action was commenced *after* the time to which the bill relates. *Moris v. Pugh*, 3 *Burr.* 1241.

Writ must be returned.

It is not sufficient to shew that a writ was sued out in time: in order to save the statute of limitations, the plaintiff must also shew that *it is returned*. 6 *Term Rep.* 617. If returned, the continuances may be entered at any time. *Ib. Harris qui tam v. Woolford.*

When not necessary to be returned.

But where an action must be brought within 3 months it is sufficient for the plaintiff to prove a writ, sued out within such time, and his declaration within a year afterwards, *without shewing such writ returned*. *Parsons v. King*, 7 *Term Rep.* 6.

PROCEEDINGS IN THIS COURT.

THERE are two ways to proceed in this court, the one *Original writ*. by the *special original*, the other by *bill*: if the debt be large, and the plaintiff has cause to think the defendant will bring a writ of error after judgment, the best method is to bring the action by *original writ*, because the defendant will thereby be precluded from bringing a writ of error (except in parliament). This *writ* issues out of the court of Chancery, and is a mandatory letter from the king, under the great seal, and directed to the *sheriff* of the county wherein the *injury* is supposed to be, requiring him to command the defendant either to do justice to the complainant, or else to appear in court, and answer the accusation against him; whatever the sheriff does, he must certify to the court, together with the writ itself.

These writs are either *optional* or *peremptory*; or, in the language of the law, they are either a *præcipe*, or a *si te fecerit securum*. The *præcipe* is in the alternative, "commanding the defendant to do the thing required, or shew the reason why he hath not done it." The use of this writ is where something certain is demanded by the plaintiff, which is in the power of the defendant himself to perform; "as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account," and the like; in all which cases the *præcipe* is drawn up in the form of a *command to do thus*, or shew cause to the contrary; giving the defendant his choice to redress the injury, or stand the suit. The other is called *si te fecerit securum*; from the words *Si te fecerit securum*. of the writ, which direct the sheriff "to cause the defendant to appear in court, without any option given to him, provided the plaintiff gives the sheriff security effectually to prosecute his claim." This writ is in use, Where this where nothing is *specifically demanded*, but only a satisfaction in general, to obtain which, and administer complete redress, the intervention of some judicature is necessary: such are *writs of trespass*, or *on the case*, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end, the defendant is immediately called to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both writs are tested or witnessed in the king's own name: "*Witness ourselves at Westminster*, or wherever the Chancery may be held."

Security.

The security here spoken of, to be given by the plaintiff, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and *John Doe* and *Richard Roe* are always returned as pledges for this purpose. The use of them was to answer for the plaintiff, who in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown, for raising a false accusation; and so the form of the judgment still is. *Finch*, 189, 252.

Return-day.

The day on which the defendant is ordered to appear in court, and in which the sheriff is to bring in the writ, is called the return of the writ; it being then returned by him to the King's Bench at *Westminster*, and made returnable in term, at the distance of at least *fifteen days* from the *date* or *teste*, that the defendant may have time to come up to *Westminster*, even from the most remote parts of the kingdom.

Cannot issue unless for 10l.

This writ cannot issue unless the cause of action amounts to *ten pounds*, or above, on pain of ten pounds, and the proceedings thereon to be void, 5 *Geo. 2. c. 27. 21 Geo. 2. c. 3.*

If plaintiff proceed by special original.

And by rule, *M. 23 Geo. 3.* if the plaintiff proceed by *special original*, and recover less than 50*l.* he is only to have the same costs as if he had proceeded by *bill*: except in such actions in which he could not proceed by *bill*, or in which any defendant shall be *actually outlawed*.

Proceeding by bill.

A *bill*, is a shewing in writing of the cause of complaint by the plaintiff against the defendant, wherein the party is supposed to have received some wrong, and it is the ground-work of the cause; it need not be filed in the office (unless the defendant have privilege, or be in actual custody of the marshal or sheriff;) but if he be in actual custody, then it must be filed to warrant the declaration; which is no more than a copy of it, or *defendant will be entitled to his discharge*.

Filing the bill, ground-work of the cause.

The *filing the bill* is the *ground-work* of the cause depending, and is as the *original* in the Common Pleas, which gives the court jurisdiction to hold plea.

Of the bill of Middlesex.

If the defendant is not in custody, the ordinary course of proceeding is by process, intituled a *bill of Middlesex*, being so called because the court now sits in that county.

The bill of *Middlesex*, (a) (which was formerly founded on a plaint of trespass *quare clausum fregit*, entered on the records of the court,) is a kind of *capias* directed to the sheriff of that county, "and commanding him to take the defendant, and have him before the king at *Westminster*, on a day prefixed, to answer to the plaintiff of "a plea of trespass;" for the accusation of trespass gives the court jurisdiction, whatever else may be the real cause of action. It must be personally served on the defendant, if he can be found in that county; but if not, then there issues out a writ of *latitat* to the sheriff of another county (as *Oxon*.) which recites the bill of *Middlesex* and proceedings thereon thus: "And that it is testified that the defendant," "latitat & discurrit," "lurks and wanders about in Oxfordshire; and therefore commands the sheriff to take him, and have his body in court on the day of the return." (b) But if the defendant lives in any other county, the *latitat* is the first process which issues to take him, and may be sued out upon a supposed, and not an actual bill of *Middlesex* issued prior; a notice in writing being written at the bottom of such writ or process directed to the defendant to appear by his attorney in court, to defend the action, to which the defendant may appear or not; which is recorded. If he appears, he finds securities for his future attendance and obedience, called *common bail*, being the same persons that are pledges for the plaintiff's prosecution, viz. *John Doe* and *Richard Roe*. If the defendant does not appear upon the return, or in eight days after, the plaintiff may enter an appearance for him, and proceed thereupon, as if the defendant had done it himself. 12 Geo. 1. c. 29. 21 Geo. 2. c. 23.

But if the defendant is held to bail, there must be

If defendant be held to bail.

(a) Formerly this process issued upon the bill being filed with the name of the *chief clerk*, and was called a bill of that county wherein the court then resided, because the *marshall* being an officer of the king's household (in whose custody the defendant was supposed to be,) was then in that county. It is called a bill of *Middlesex* to distinguish it from the original bill, or declaration. Formerly process issued on bill being filed.

(b) This writ was called a *testatum*, but gained afterwards the name of *latitat*, from that word therein *cum testatum est quod latitat*, &c. and is in nature of a *testatum bill*.

added in these writs a clause of *ac-etiam* to the usual complaint of trespass; the bill of *Middlesex*, commanding the defendant to be brought in to answer the plaintiff in a plea of trespass, "*and also to a bill to be exhibited against him for one hundred pounds debt,*" or "*upon promises,*" as the case is, the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest. *Stat. 13 Car. 2. stat. 2. c. 2.*

When defendant is arrested.

When the defendant is regularly arrested, he must either go to *prison* for safe custody, or put in *special bail* to the sheriff; the intent of the arrest being only to compel an appearance in court at the *return of the writ*: that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail*; and he is supposed to continue in the custody of the bail, instead of going to gaol.

Deposit.

But now, by *stat. 43 Geo. 3. c. 2.* instead of giving bail, he may deposit with the sheriff or his officer, the sum indorsed on the writ, with 10*l.* in addition, to answer the costs, and such further sum, if any, as shall have been paid for the king's fine on any original writ, and thereupon he shall be discharged, which the sheriff is to pay into court, and if the defendant perfect his bail in due time, the sum shall be by the court ordered to be repaid, on motion. *Sect. 2.*

Bail.

Upon the return of the writ, or *within four days* after, the defendant must appear according to the exigency of the writ.^a This appearance is effected by putting in, and justifying bail, to the action. If this be not done, and the bail that were taken by the sheriff *below*, are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond (under the *stat. 4th and 5th Ann. c. 16.*), and bring an action thereupon against the sheriff's bail; but if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff himself; by calling upon him first, to return the writ, (if not already done,) and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be perfected, (or surrender him on the fourth or sixth day mentioned in the latter rule,) he will himself be responsible to the plaintiff, by an attachment, for not obeying it.

^aIn London and Middlesex, but if in any other county, six days.

If the bail to the sheriff be insolvent.

When bail must be put in.

If by bill.

The bail must be put in either in *open court*, or before one of the *judges thereof*, or else in the country before a commissioner appointed by *stat. 4 & 5 W. & M. c. 4.* and must be transmitted to the court and filed. These bail,

who must at least be *two in number*, if the action be *by bill*, must enter into a *recognizance* before such judge or commissioner to this effect, "*that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner to the custody of the marshal, or that they will do it for him:*" which recognizance is transmitted to the court on a slip of parchment, intituled a *bail-piece*: if *by original*, the If by original. recognizance is in a *certain sum*, being *double*(a) the *debt sworn to*: and, if required, the bail must justify themselves in court, (or before the commissioner in the country, by affidavit,) "*by swearing themselves house-keepers, and each of them to be worth double the sum for which they are bail, after payment of all their debts.*"

They may now discharge themselves by surrender May discharge themselves. without justifying, after exception, or before the expiration of the rule to bring in the body, or after the bond is assigned, or on the return-day of the first *sci. fa.* if returned *scire feci*, or on the return-day of the second *sci. fa.* if the *first* be returned *nihil*. But such render is not complete till an *exoneretur* is entered on the bail-piece; see title *Surrender*. In an action on the recognizance, plaintiff is to surrender in *eight days in full term next after the return of the writ of latitat, &c.*

When the defendant has filed *common bail*, or put in Declaration. *special bail*, as the case requires, the next proceeding on the part of the plaintiff is, to *declare against him* (if he has not done it previous, by filing the declaration *de bene esse*, on the return-day, which he may do by *R. T. 22 Geo. 3*) by *delivering* a declaration, which is the *complaint*, being an amplification or exposition of the original writ (if the plaintiff proceeds by original) upon which his action is founded; but the declaration upon the bill is a mere copy of it: when the defendant is brought into court, if the action is *by bill*, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper (unless he has held him to bail by a special *ac-etiam*, which the plaintiff is then bound to pursue.)

This declaration concludes with these words "*and Conclusion of therefore he brings his suit, &c.*" by which word *suit* was declaration. anciently understood the witnesses or followers of the

(a) But by rule, *M. 51 Geo. 3.* in bailable causes for any sum exceeding 1000*l.* it is sufficient for the bail above to justify in 1000*l.* beyond the sum sworn to.

plaintiff. For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out, at least, a probable cause. *Bract.* 400. At the end of the declaration, if the suit be *by bill*, are added also the plaintiff's common pledges of prosecution, "*John Doe and Richard Roe*," which are now mere names of form, and the omission of them at the end of the declaration is no ground even of special demurrer; 3 *T. R.* 157., though formerly the names of real persons were inserted, who were to answer to the king for the amerciamment of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict and judgment against him. 3 *Buls.* 275.

When the plaintiff has stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his defence, and put in a plea, or else the plaintiff will at once recover judgment by default against him. *Vide R. Trin.* 22 *Geo.* 3.

Defence.

Defence is a general assertion that the plaintiff hath no good ground of action, which assertion is afterwards extended and maintained in this plea; but before he puts in his plea, he may *crave oyer of the bond*, or other *specialty* upon which the action is brought; that is, to hear it read to him, the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves, whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition, or other part of it, not stated in the plaintiff's declaration.

Cannot have oyer of original.

The defendant cannot now *crave oyer* of the original writ. *Boats v. Edwards*, *Dougl. Rep.* 227. For it is not warranted by any rule or principle of justice, and it is incumbent on the court to make their proceedings as little dilatory, oppressive, and expensive as possible. *Ibid.*, and see 7 *East.* 383.

Plea.

Pleas are of two sorts, *dilatory*, and *pleas to the action*. *Dilatory*, are such as tend merely to delay or put off the suit by questioning the propriety of the remedy rather than by denying the injury. *Pleas to the action*, are such as dispute the very cause of suit. The former cannot be pleaded, after a *general imparlance*, which is an acknowledgment of the propriety of the action; but the latter may.

Pleas in abatement.

Dilatory pleas are either to the *jurisdiction of the*

court, the disability of the plaintiff, or, in abatement of the writ, or count, as by misnaming the defendant, which is called a misnomer, or other want of form in any material respect; or it may be that the plaintiff is dead, or of a suit depending in another court, for the same cause of action.

The former were very often used without any foundation of truth, and calculated only for delay; therefore by 4 & 5 Ann. c. 16. affidavit must be made of the truth thereof.

In cases where the matter is pleaded in abatement, which appears upon the record, (as variances,) no affidavit is requisite. 2 *Ld. Ray.* 1409. So want of addition. *Prac. Reg.* 5.

Before a plea in abatement can be pleaded, it is requisite for the defendant to appear, and take the declaration out of the office.

Pleas to the jurisdiction (except ancient demesne) and pleas in abatement, ought to be pleaded before a general imparlance, *within four days inclusive* of both days, after delivery or filing the declaration; unless it be filed or delivered after term, or so late in the term that defendant is not bound to plead to it that term: in both which cases, the defendant may *within four days inclusive* of the next term, plead to the jurisdiction of the court, or in abatement, intituling his plea as of *the preceding term*. *N. on R. E. 5 Ann.* 1 *Salk.* 367.

If it be pleaded as of the *next term*, then there must be a special imparlance moved for. *R. E. 5 Ann.* which should be stated on the record (meaning the roll.) *Dough-ty v. Lascelles*, 4 *Term Rep.* 520. 3 *Term Rep.* 627, *Smith v. Miller*. And *Sunday* is to be counted one of the four, unless it be the *last*; if so, then defendant has all *Monday* to file his plea. *Lee v. Carlton*, 3 *Term Rep.* 642.

The *plea in abatement* is to be pleaded *within the time*, whether a rule be given or not, and filed, signed by counsel. 1 *Term Rep.* 278. *R. E. 5 Ann.* *Lil. Pr. Reg.* 3. 5 *Term Rep.* 210.

When these are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court, or to amend his declaration. *Co. Entr.* 271. But when they are overruled on demurrer, there shall be a judgment of *respondeas ouster*, or that the defendant answer over.

2 Wils. 368. *Eichorn v. Le Maître*, Carth. 447. 5 Mod. 399. Ray. 329. It is then incumbent on him to plead a plea to the action; that is, to answer the merits of the complaint, which is done by confessing or denying it.

On a plea of misnomer if issue be joined thereon, the judgment is peremptory.

But where the issue is joined on a plea of *misnomer* in the defendant's christian name, and issue be taken thereon, and a verdict be found for the plaintiff, the judgment is peremptory, and there is no difference whether the issue be joined in a plea in abatement, or in a plea in bar: for wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether his plea be true or false. *Ibid. Bro. tit. Peremptory*, 906; and if the issue be found for the defendant, he is entitled to costs. 2 *Ld. Ray.* 292. So for the plaintiff.

Confession.

A confession of the whole complaint is not usual, for by that, the defendant ends the matter; to avoid which, he may suffer judgment to go by default. But frequently he confesses one part of the complaint, (by a *cognovit actionem* in respect thereof,) and traverses, or denies the rest, in order to avoid the expence of carrying that part to a formal trial, which has no ground to litigate. A species of this sort of confession is by payment of money into court; which is necessary upon pleading a tender, or if defendant have omitted to make a tender, he may after action brought pay into the hands of the proper officer of the court as much as he acknowledges to be due, and if the plaintiff accepts the same in full satisfaction, he will be entitled to his costs to be taxed; but if *after* the money is so paid into court, the plaintiff does not accept the same in *full*, he is at liberty to take the money out of court, and proceed for further damages, and if he fail he will be entitled to his costs up to the time of paying the money into court, but must pay the defendant his subsequent costs. The defendant may also plead a set-off, whereby he acknowledges the justness of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own to counter-balance that of the plaintiff, either in the whole, or in part: but this must be where there are *mutual debts* between the parties. 2 *Geo. 2. c. 22.* 8 *Geo. 2. c. 24.*

Payment of money into court.

General plea.

Pleas that totally deny the cause of complaint, are either the *general issue*, or a *special plea in bar*.

General issue, definition of.

The general issue, or general plea, is what traverses, thwarts, and denies the whole declaration; without offer-

ing any special matter to evade it, as in trespass *vi et armis*, or on the case for consequential damage, *not guilty*; in debt upon contract, *nil debet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed; in assumpsit, *non assumpsit*, he made no such promise; or in real actions, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right the mise or issue is, *that the tenant has more right to hold, than the demandant has to demand*. These pleas are called the general issue, because, by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue; by which is meant a fact affirmed on the one side, and denied on the other.

Special pleas in bar of the plaintiff's demand, are very various, according to, the circumstances of the defendant's case; as in real actions, a *general release* or a *fine*, both of which may destroy and bar the plaintiff's title. Or in personal actions, an *accord*, *arbitration*, *conditions performed*, *non-age of the defendant*, or some other fact which precludes the plaintiff from his action. A *justification* is likewise a special plea in bar: as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or in an action of slander, that the plaintiff is really as bad a man as the defendant said he was. The statute of limitations may also be pleaded in bar, for which, see the several statutes under title *Limitations of Actions*.

Special pleas are usually in the affirmative, sometimes in the negative, but always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form, "*and this he is ready to verify*;" and it is a rule in pleading, that no man be allowed to plead *specially*, such a plea as amounts only to the general issue, or a total denial of the charge; and when such plea is pleaded, it is a good cause of special demurrer, but not of general demurrer, since the *stat. 27 Eliz. 10 Co. 95, a. Roll Rep. 112. Cro. Car. 157.* being only matter of form. 3 *Mod.* 166.

When the plea of the defendant is put in or filed, if it does not amount to an issue or a total contradiction of the declaration, but only evades it, the plaintiffs may reply to the defendant's plea, which is called a replication; either traversing it, that is, totally denying it, or

alleging new matter in contradiction to or in avoidance of the plea.

Rejoinder. To the replication the defendant rejoins, or puts in an answer called a rejoinder. The plaintiff may answer the
Surrejoinder, &c. rejoinder by a surrejoinder, upon which the defendant may rebut; and the plaintiff may answer by a surrebutter. The whole is denominated the pleading, in the several stages of which it must be carefully observed, not to depart or vary from the title or defence which the party has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder the plea, without departing out of it:
Novel assignments. yet in many actions the plaintiff, who has alledged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more peculiar certainty, *by assigning the injury afresh*, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint, which is called a *new or novel assignment*. 1 Inst. 124. 6 Mod. 120. 2 Ld. Ray. 1015. Bull. Nis. Pri. 17.

Averments on an issue taken. In any stage of the pleadings, when either side advances or affirms any new matter, he usually avers it to be true, "*and this he is ready to verify*." On the other hand, when either side traverses or denies the fact pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different, according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "*and of this he puts himself upon the country*," thereby submitting himself to the judgment of his peers; but if the traverse lies upon the plaintiff, he tenders the issue or prays the judgment of the peers against the defendant in another form: thus, "*and this he prays may be inquired of by the country*;" for when in the course of pleading they come to a point, which is affirmed on one side, and denied on the other, they are then said to be at issue, all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.

But if either side (as for instance the defendant) pleads a special negative plea, not traversing or denying any thing that was before alledged, but disclosing some new negative matter: as where the suit is on a bond, *conditioned to perform an award*, and the defendant pleads ne-

gatively, "*that no award was made,*" he tenders no issue upon this plea, because it does not appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an *actual specific award*, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff, which being the end of all the pleadings, is either matter of law or fact.

An issue upon matter of law, is called a *demurrer*; *demurratur*, it rests or abides; and it confesses the facts to be true, as stated by the opposite party; but denies, that by the law arising upon those facts any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs upon the point in question. As if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass; then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right; here the plaintiff may demur in law to the plea, and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case; and upon the parties joining in demurrer, the issue is then complete, and the proceedings being entered on record, the matter of law on which the demurrer is grounded, is upon solemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given.

Where there are issues *in law* and *in fact*, the determination of the issues in law may be either *before* or *after* the trial, at the plaintiff's election: but if the issues be tried *first*, the court will not give leave to *withdraw the demurrer and plead*, although the court would have permitted it after demurrer argued. 1 Burr. 316. Robinson v. Raley, Bay. Rep. 316.

An issue of fact is where the fact only and not the law is disputed, and when he that denies or traverses the fact pleaded by his antagonist has tendered the issue thus, "*and this he prays may be inquired of by the country;*" or "*and of this he puts himself upon the country;*" it may be immediately subjoined by the other party, "*and the said A. B. doth the like;*" which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question to the determination of a jury.

Continuances. During the whole of these proceedings from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be continued in court from day to day till the final determination of the suit. In the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *nonsuit*, or if the negligence be on the side of the defendant, judgment may be had against him, for such his default; and, after issue or demurrer joined, as well as some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear from time to time, as the exigence of the case may require. The giving of this day is called *the continuance*, because thereby the proceedings are continued without interruption, from one adjournment to another.

Nonsuit.

Of the Plea Puis darrein continuance.

Puis darrein continuance when to be pleaded. It may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some *new matter*, which it is proper for the defendant to plead; as that the plaintiff has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter as early as he possibly can, *viz. at the day given for his next appearance*, he is permitted to plead it, and it is called a plea *puis darrein continuance*, or *post ultimum continuationem*, or since the last adjournment, for it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former: it is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties, *Cro. Eliz.* 49. and waives the former pleading: and it is not allowed to be put in, if any *continuance* has *intervened* between the arising of this fresh matter, and the pleading of it, *2 Wils.* 138. for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. *Say.* 268. *Ld. Ray.* 693. *Salk.* 178. After a plea *in bar*, if the defendant plead a plea *puis darrein continuance*, this is a *waiver of his bar*, and no advantage shall afterwards be taken of it, *1 Salk.* 178. Also it is not allowed after a *demurrer is determined*, or a *verdict given*. *1 Str.* 493. *Mo.* 871. *1 Ld. Ray.* 266. *Hob.* 81. *contra*; because then re-

When not allowed to be pleaded.

lief may be had in another way, namely, by writ of *audita querela*, which is in the nature of a bill in equity, Audita to be relieved against the oppression of the plaintiff. This *querela*. writ is now almost rendered useless, since the courts have shewn so much indulgence in granting a summary relief upon motion. *Ld. Raymond*, 489. (a)

A man shall have but one plea *puis darrein continuance*. But one plea. 4 H. 7. fol. 8.

Defendant after a verdict against him, obtained a rule for a new trial, which after argument on a subsequent day was discharged; he then pleaded a plea *puis darrein continuance*, intituled of the term generally; and the court refused to order a special memorandum of the day it was filed. *Lovell v. Eastaff*, 3 Term Rep. 554.

The last continuance at the sittings or assizes is the day The last con- of the return of the *venire facias*, from whence the plea tinuance is continued by the award of the *distringas* to the next term, unless the chief justice or judges of assize, shall first come on the day of *nisi prius*. *Bull. N. P.* 310. 1 *Black. Rep.* 497. *Dy.* 361. And on this day, if any matter of defence has arisen after the last continuance, it may be pleaded. These pleas are two-fold, in abatement and in bar. *Gilb. C. P.* 105.

If any thing happen pending the writ, to abate it, this may be pleaded *puis darrein continuance*, though there be a plea in bar; for this only waives all pleas in abatement, that were in being at the time of the bar pleaded, and not subsequent matter: but though it be pleaded, in abatement, yet, after a former bar pleaded, it is peremptory, as well on demurrer, as on trial; because after pleading in bar, the defendant has answered in chief, and therefore can never have judgment to answer over. *Gilb. C. P.* 105. *Aleyn*, 66. *Freem.* 252.

Pleas after the last continuance must be verified on oath, before they are allowed. *Freem.* 252. 1 *Str.* 493. and they cannot be amended after the assizes are over. *Bull. N. P.* 309. *Yelv.* 181. *Freem.* 252.

When a plea of *puis darrein continuance* is put in at When plea put in at the assizes.

(a) It is the constant practice at the assizes, to put the party to verify such a plea before it is allowed; and if the party does not give some evidence of the truth of it, the judge will reject it, and go on with the cause. *Martyn v. Gryvill*, 1 *Str.* 493.

the assizes, the plaintiff is not to reply to it there, for the judge has no power to accept a replication, nor to try it, but ought to return the plea as parcel of the record of *nisi prius*. 2 Mod. 307. And if the plaintiff demur, it cannot be argued there. *ib*. Where the plea is certified on the back of the *postea*, and the plaintiff demurs; if the defendant, on the expiration of a rule, given him to join in demurrer, refuses to do so, the plaintiff may sign judgment. *Bull. N. P.* 311. *Freem.* 254.

If plea be filed.

If the plea be *filed* and *verified* on oath, the court cannot set it aside on motion, but are bound to receive it. 2 Wils. 137. 3 Term Rep. 554. *Lovell v. Eastaff*.

In the breast of judge whether he will accept the plea.

It is at the discretion of the judge at *nisi prius*, if pleaded there, whether he will accept such plea or not; that is, whether he will or not proceed in the trial. See *Bull. N. P.* 309. *Say. Rep.* 268.

Plea puis darrein cont. cannot if rejected if verified by any affidavit.

Issue was joined, *venire facias* was awarded, returnable *quindecim Hil. 27th January*: after this last continuance, the defendant on the 30th of January, pleaded generally, that *puis darrein continuance*, viz. on such a day he became a bankrupt, *hoc paratus est verificare*, &c. and verified this plea by an affidavit. Motion to set it aside as a dilatory plea, alleging it to be discretionary in the court, whether they would receive it or not. C. J. said, "That such discretion was contrary to the genius of the common law of England, and would be more fit for an eastern monarchy than for this land of liberty *nulli negabimus, &c. justitiam*;" and there is no difference between this plea, and any other defence, but this, viz. that the fact which warrants this plea, first existed or happened *since the last*, and *before the next* continuance; it is a defence which the party could not possibly make when he first pleaded, and which he is bound to make after the last continuance, and before the next. *It must be verified by affidavit. Paris v. Salkeld*, 2 Wils. 137. 1 Str. 362. If such a plea is bad, it must be determined on demurrer. Rule discharged.

Affidavit.

When it cannot be pleaded.

It cannot be pleaded *after the day of nisi prius*, and before the day in bank, 2 Lut. 1143. *if there has been' a verdict*. But if the jury remains *propter defectum*, a release after the award of the *nisi prius*, may be pleaded *the day in bank*. Bro. Cont. 30. 22 H. 6. 1.

How to proceed.

This plea should be engrossed on a 4d. stamp-paper, signed by counsel, and affidavit is to be made of the truth; and in term, I take it, if there are *special pleadings*

it ought to be filed, *notice being given to the other side*; if tendered at *nisi prius*, court should be moved to receive it. If there are no special pleadings, then the plea may be delivered to the attorney in term-time.

How to plead a release *puis darrein continuance*, *Lut.* How to plead release.
1142, before issue joined, 1177.

When the parties are at issue as before-mentioned, the *Venire*. court awards a writ of *venire facias* upon the roll, commanding the sheriff, "that he cause to come at *Westminster*, on such a day, twelve free and lawful men of the "body of the county, by whom the truth of the matter "may be better known, and who are neither of kin to "the plaintiff or defendant, to recognize the truth of the "issue between the parties." The jury is not summoned upon this writ, and therefore not appearing at the day, must unavoidably make default; and a compulsive process is now awarded against the jurors, called a *distringas*, *Distringas*. "commanding the sheriff to have the bodies of the "jurors, or to distrain them by their lands and goods, "that they may appear upon the day appointed, (*nisi prius*,) unless before that day the chief justice shall "come into *London*, *Westminster*, or the county where "the *venue* is laid."

This clause of *nisi prius* was inserted by virtue of the statute of Westminster, 13 Ed. 3. c. 30. 42 Ed. 3. c. 11.

When the general day of trial is fixed, the plaintiff, or *Nisi prius* re- his attorney, must bring down the record (which is *cord*. previously passed) to the assizes, and enter it with the judge's marshal, in order to its being called on; but if the cause is to be tried at the sittings in *London* or *Westminster*, the record is taken to the chief justice's chambers, and his clerk enters it for trial. When the cause is called on, either at the assizes or at the sittings, the record is then handed to the judge to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn: the case is opened on the part of the plaintiff and defendant by their counsel, and when the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence; they consider and re-

turn their verdict at the bar; which is *recorded* in court by the proper officer, and then they are discharged.

Postea.

If the issue be found either for the plaintiff or defendant; or specially; or if the plaintiff makes default; or is nonsuit: it is entered on the back of the record, and is called a *postea*; which being entered, judgment may be signed thereon, unless ordered by the court to the contrary, for the verdict may be suspended for certain causes by a motion for a new trial, or arrested. 6 *Mod.* 22. *Salk.* 649. 1 *Burr.* 390.

Error.

But if the judgment cannot be arrested, or the party convicted cannot obtain a new trial, execution will follow; unless the party condemned thinks himself unjustly aggrieved by any of the proceedings: and then he has his remedy to reverse the same by bringing a writ of error if the objection appears upon the face of the record; but he that brings it must find substantial bail (to prosecute the same) after verdict *in all cases*, and must bring it in time so as to prevent the plaintiff's taking out execution after judgment signed. *Vide* 3 *Jac.* 1. c. 8. 13 *Car.* 2. c. 2. 16 & 17 *Car.* 2. c. 8.

Bail.

Execution.

The execution of the judgment is adapted to the nature of the action; therefore if the plaintiff recover in a *real* or *mixed* action, wherein the seisin of the land is awarded to him, the writ is an *habere facias seisinam*, or an *habere facias possessionem*. *Finch*, 470. *Co. Lit.* 34.

Executions are of four sorts.

Executions in actions where money only is recovered as a debt, or damages, at the suit of the subject, (and not any specific chattel,) are of four sorts: against the body of the defendant, called a *capias ad satisfaciendum*, or against his goods and chattels, called a *fieri facias*; or against the goods and the profits of his lands, called a *levari facias*; or against the goods and the possession of his lands, called an *elegit*: but at the suit of the king against all three, his body, lands, and goods, called an *extent* or *extendi facias*. Only one of these writs can be issued at one time. 2 *Inst.* 143. *Co. Litt.* 293. *T. Raym.* 346.

Satisfaction.

When the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by compulsory process, or otherwise, the defendant may compel the plaintiff to *enter satisfaction on the record*, that the defendant may not be liable hereafter to be harrassed a second time on the same account; which is done by giving a warrant of attorney for that purpose, 2 *Lill. Abr.* 605; but the costs must be paid by the defendant.

OF THE JUDGES OF THE COURT.

The court is composed of the chief justice and three other justices.

The present Judges are,

The Right Honourable *Edward*, Lord *Ellenborough*.

Sir *John Bayley*, Knight.

Sir *George Sowley Holroyd*, Knight.

Sir *Charles Abbot*, Knight.

OFFICERS OF THE CROWN SIDE, ARE,

The king's coroner and attorney, commonly called the clerk of the crown, or master of the crown office, who taxes costs, nominates all special juries on the crown side, takes recognizances, inquisitions upon the death of any prisoner dying in the King's Bench, &c. *James Templer*, Esq.

The secondary, who draws up the paper books, and makes up an *estreat* of all fines, &c. forfeited to the crown, *Henry Barlow*, Esq.

The clerk of the rules, who draws up all the rules of the court, and attends the court to take minutes thereof, Hon. *Edw. Law*, and *Osborn Markham*, Esq. *Henry Dealtry*, Dep.

There are also two other officers, the *examiner and calendar keeper*, *Robert Belt*, Esq.

Clerks in court, *R. Belt*, *G. Lepipre*, *H. Dealtry*, *H. Barlow*, *B. Burnet*, *W. S. Jones*, *W. Belt*, *P. Dealtry*, and *C. F. Robinson*, Esqrs.

ON THE PLEA SIDE.

THE chief clerks, secondary or master, their deputy, marshal, clerk of the rules, clerk of the papers, clerk of the day rules, clerk of the dockets, clerk of the declarations, clerk of the bails, postea's, and estreats, signer of writs, signer of the bills for Middlesex, custos brevium, clerk of the upper treasury, clerk of the outer treasury, filacer, exigenter, and clerk of the outlawries, clerk of the errors, deputy marshal, marshal and associate to the chief justice, train-bearer, clerk of the nisi prius in London and Middlesex, clerks of the nisi prius to the different counties appointed by the custos brevium, crier at nisi prius in

London and Middlesex, receiver general of the seal office; criers, ushers, and tipstuffs.

Master, Robert Foster, Esq. and Thomas Le Blanc, Esqrs.

Chief clerks, The Hon. Ed. Law, Osborn Markham, Esq.

Marshal of K. B. P. William Jones, Esq.

Clerk of the rules, Charles Short, Esq.

Assistant, Mr. Samuel Card.

Clerks of the papers, Samuel and Joshua Platt, Esqrs.

Clerk of the papers of the K. B. prison, William Hughes.

Clerk of the day rules, William Hill, Esq.

Clerk of the dockets, commitments and satisfactions, William Prevost. John Clarke, Dep.

Clerk of the declarations, Robert Foster, Esq. Deputy, L. Maddocks.

Clerk of the common bails, postea's, and estreats, Mr. Richard Smith.

Signer of the writs, Messrs. Provost and Chambre.

Signer of the bills for Middlesex, J. Stanley, Esq.

Custodes brevium, Lord Kenyon, Hon. H. Law.

Clerk of the upper treasury, Mr. Thomas White.

Clerk of the outer treasury, Mr. Edge.

Filacer, exigenter, and clerk of the outlawries, The Hon. Thomas Kenyon.

Filacer for Essex and Monmouthshire, Mr. And. Edge.

Clerk of the errors, Mr. Smith.

Marshal and associate to the chief justice, Honourable Edward Law. Mr. Jones, Dep.

Trainbearer, Mr. Thomas Prince.

Clerk of nisi prius in London and Middlesex, T. Lowten, Esq.

Crier at nisi prius in London and Middlesex, Mr. Smith.

Receiver general of the profits of the seals in K. B. and C. P. Duke of Grafton.

Dep. Mr. Poole.

Sealer, John Pimlot.

Clerk to the lord chief justice, T. Platt, Esq.

Crier and usher, Mr. William Green.

Deputy ushers, Mr. Hewit, Mr. Harris, and Mr. Green.

Tipstaff to lord chief justice, Mr. Thomas Prince.

*To the other judges, John Belcher and Mr. Stones.
Dep. Thomas Gibbons.*

The clerk of the papers of the K. B. prison cannot act by deputy, but must himself reside within the prison. Stat. 27 Geo. 2. c. 17. *Rex v. Bryant*, 4 Term Rep. 76.

Sheriffs may also be considered as officers of the court, and they ought to have deputies to receive and return writs and process, who ought to give personal attendance in Westminster-hall daily in term time. 23 Hen. 6. c. 9. R. M. 1654. s. 1. R. E. 15 Car. 2. Reg. 4.

ATTORNIES OF THE COURT.

AN *attorney* at law, answers to the procurator, or proc- Definition.
tor, of the civilians and canonists; and he is one who is put in the place, stead, or turn of another, to manage his matters of law.

Before the statute of *Westminster*, 2. (13 Ed. 1.) c. 10. all attorneys were made by letters patent under the broad seal, commanding the justices to admit the person to be an attorney. These patents were enrolled in the courts in which any proceedings were. The statute gives to all persons a liberty of appearing by attorney, as if they had letters patent: otherwise they were to appear each day in court, in their proper persons; in consequence of which great numbers of attorneys were admitted by the judges, whereby many *unskilful* ones practised, which occasioned many mischiefs; for restraining of which, the stat. 4 H. 4. c. 18. enacted, "*that the judges should examine them, and at their discretion put those who were virtuous, and of good fame, on the roll, and those on the contrary to strike out.*" and the stat. 33 H. 6. c. 7. limits the number in *Norfolk* and *Suffolk*. Formerly
were made by
letters patent.

These attorneys are now formed into a regular body; they are admitted to the execution of their office by the *superior courts of Westminster-hall*, and are in all points *officers* of the respective courts in which they are admitted: and as they have many *privileges* on account of their attendance there, so they are peculiarly subject to the *censure* and *animadversion* of the *judges*.

The attornies of *B. R.* are of record as well as the attornies of *C. B.* 1 *Roll.* 3.; and it is now the common course for the plaintiff or defendant to appear by attorney, *F. N. B.* 26 *D.* But where the party stands in *contempt*, the court will not admit him by attorney, but oblige him to appear in person. *Ibid.* 262. Outlawry is excepted by *stat.* 4 & 5 *W. & M.* c. 18.

None to be admitted but such as have been brought up in soliciting causes, &c.

By *stat.* 3 *Jac.* 1. c. 7. "none shall be admitted attornies "in any of the king's courts of record at Westminster, "but such as have been brought in the same court, or "otherwise *well practiced in soliciting causes*: and "had been found by their *dealings* to be *skilful*, and of "*honest dispositions*."

And by rule must have served five years.

And by rule, *M.* 1654. *sect.* 1. none are to be admitted, unless he shall *have served by the space of five years as a clerk to some judge, serjeant at law, practising counsel, attorney, clerk, or officer of one of the courts at Westminster*, and found, on examination, of *good ability*, and *honesty for such employments*. See *sect.* 4.

To take the oaths.

By 13 *W.* 3. c. 6. attornies are to take the oaths to government, under penalties and disability to practice.

If an attorney convicted of forgery, &c. practice, judge to transport.

12 *Geo.* 1. c. 29. If any who hath been convicted of *forgery, perjury, subornation of perjury, or common barrettry*, shall *practice as an attorney, or solicitor, or agent, in any suit or action brought in any court of law or equity within England*, the judge hath power to *transport the offender for seven years*, by such ways, and under such penalties, as felons.

No person to commence any action or defend without being sworn and enrolled in one of the courts.

No person, after 1st *December*, 1730, to act as an attorney, or sue out any writ, or commence, carry on, or defend any action, &c. either before or after judgment, in the name of any other person in the King's Bench, Common Pleas, or Exchequer, duchy of *Lancaster*, or in any of the courts of great sessions of *Wales*, or of the counties palatine, or in any other court of record in *England*, where attornies have been accustomedly admitted and sworn, unless such person shall take the oath appointed to be taken, and shall be admitted and enrolled before 1st *Dec.* 1730, in such of the said courts where he shall act as an attorney, or shall be sworn, admitted and enrolled in the said courts. 2 *Geo.* 2. c. 23. s. 1.

A judge before admission to examine if he be qualified; if so, then

Any one or more of the judges of the said courts respectively, shall, before they admit such person to take the said oath, examine and inquire touching his *fitness*, &c. and if satisfied that he is *qualified*, then to adminis-

ter the oath, and after such oath taken, cause him to be admitted an attorney of such court respectively, and his name to be enrolled as an attorney without fee, except 1s. for the oath: the admission to be written on parchment, wherein the usual stamp shall be first impressed and delivered to the person admitted. *s. 3.* The stamp is now 20l. 48 *Geo. 3. c. 149.*

to administer
the oaths, &c.
Admission.

The like clause as the first, respecting persons soliciting suits in the court of Chancery, court of equity, in the Exchequer-chamber, court of the duchy of *Lancaster* and *Westminster*, or courts of the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in any inferior court of equity in *England*. *Sect. 4.*

The like
clause respect-
ing solicitors.

The master of the Rolls, two of the masters in Chancery, the barons of the court of Exchequer, the chancellor of the duchy of *Lancaster*, and the judges of the other courts of equity, or any one or more of them, shall examine before they admit the person to take the oath, touching his fitness and capacity to act as a solicitor, &c. and if satisfied, to administer the oath, &c. and cause him to be admitted a solicitor, &c. *Sect. 5.*

The master of
the Rolls, &c.
shall examine
solicitors.

A solicitor in Chancery may practice on the equity side of the Exchequer, without being admitted a solicitor in the latter court. *Meddowcroft v. Holbrooke*, 1 *H. Black. Rep.* 50.

May practice
on the equity
side of Ex-
chequer.

No person shall be admitted to act as an attorney, or sue out any process, or defend any action in the name of any other person, in any of the courts of law aforesaid, unless such person shall have been bound by contract in writing to serve as a clerk for five years, to an attorney *duty and legally sworn and admitted in some or one of the said courts*, and such person, during the said term of five years, shall have continued in such service; and also unless such person, after the expiration of the said five years, shall be examined, sworn and enrolled, as before required. *Sect. 6.*

None to act
unless bound
by contract
for five years
to a sworn
attorney.

The judges before they admit such person, are to inquire touching his fitness and capacity, and if satisfied, are to administer the oath, and cause him to be admitted and enrolled. *s. 7.*

Judges to ex-
amine.

The like with respect to persons who are to be admitted solicitors in the courts of equity. *s. 8 & 9.*

Solicitors.

An attorney admitted in any of the said courts of law, or as a solicitor in any of the said courts of Chancery, with the consent of any attorney in any of the said other

An attorney
of this court
may sue in
any other,

with consent of an attorney of that court. courts, such consent being in writing, signed by such attorney, and in the name of such attorney, to sue out any writ, or commence, carry on, prosecute or defend any action or proceeding in such court, notwithstanding such person is not sworn or admitted to be an attorney of such court. *Sect. 10.*

Not to have more than two clerks. No attorney shall have more than *two* clerks at one and the same time, who shall be bound by contract in writing to serve as clerks. *Sect. 15.*

Secondary of K. B. The prothonotaries and the secondary of the King's Bench, &c. to have three clerks at the same time, and no more; and such clerks having served *five years*, may be admitted the same as any other clerk. *Sect. 16.*

May carry on proceedings in Wales, by consent. An attorney of this court may, by the clause of the statute, carry on proceedings in the court of great sessions of *Wales*, in the name of an attorney of that court, and declare for business and fees.

Sworn attorneys permitting those that are not, to issue out writs, disabled from practice. If any sworn attorney of this court shall knowingly and willingly permit or suffer any other person to sue out any writ, or commence or defend any action in his name, not being a sworn attorney, or a sworn solicitor in Chancery, &c. and shall be thereof convicted, he shall, from the time of such conviction, be disabled to practice, and his admittance to be void. *Sect. 17.*

Attorneys to be enrolled. The chief clerk of this court, is without fee or reward to enrol the name of every person who shall be admitted an attorney, and the time when, in rolls or books, to which all persons shall have recourse without fee or reward. *Sect. 18.*

A sworn attorney may be admitted a solicitor. A sworn attorney of this court may be sworn, admitted, and enrolled, a solicitor in all or any of the courts of equity, without any fee for the oath, or any stamp, if the master of the Rolls, &c. shall, on examining him, be satisfied that such attorney is duly qualified to be so admitted. *Sect. 20.* A sworn solicitor in one court of equity, may be admitted into any other court. *Sect. 24.*

Attorney, &c. in their own names suing out any writ not enrolled, forfeit 50l. Any person in his own name, or in the name of any other, suing out any writ, or commencing or defending any action, &c. in any of the courts of law or equity, mentioned in the said act, as attorney or solicitor, in expectation of any gain, fee, or reward, without being admitted, shall forfeit 50l. to the use of, the person who shall prosecute, and be made incapable to maintain any

action for any fee, reward, or disbursements, on account of prosecuting or defending such action, &c. *Sect. 24.*

Frazer, an attorney of this court, had taken for his artickled clerk, one *Smith*, a turnkey of the *King's Bench Prison*, a full aged man, and who still continued to act as turnkey. It did not appear that any money was paid, or that the master fed, lodged, or entertained the clerk (though the articles covenanted that he should,) nor did the clerk officiate for *Frazer*, but in the matters relating to the prison. It appeared that *Frazer* had, since these articles (which were dated only two years ago, in 1755,) become concerned in sixty-three causes, on behalf of the prisoners in the gaol. The court were all very clear, that these articles were merely collusive, and contrived to secure the business arising from the prisoners, and ordered the articles to be cancelled. *Frazer's case*, 1 Burr. 291.

Articles cancelled by order of court.

John Hill, previous to 1791, served as a writer to *Thomas Webb*, an attorney, living at *Birmingham*, to whom he applied to be artickled, and was refused: on which, in January, 1791, he artickled himself to *Hughes*, an attorney, seven miles distant from that town: but as *Hughes* was about removing thither, and most of his business lay there, it was considered more convenient for *Hill* to remain where he was till *Hughes* settled at *Birmingham*; which *Hill* accordingly did, and continued to write for *Webb* for ten months after he was so artickled to *Hughes*. But during that time, he did attorney's business for *Hughes*, from time to time, in *Birmingham*, whither *Hughes* frequently went; and, in particular, *Hughes* sued out process for him on several occasions out of the county court. And at the end of ten months, when *Hughes* removed to *Birmingham*, *Hill* went and resided with him altogether. Rule to strike *Hill* off the roll, not having served the regular time of five years, as an artickled clerk with an attorney, previous to his admission in Hilary Term, 1791. *Ld. Kenyon*. The main part of the business, during the first ten months, was done in another man's service, and not in the service of the master to whom he was artickled. *Lawrence, J.* The object of the act was to prevent the admission of unfit persons to be attornies: now if it were sufficient to serve any other person during that time, provided it were with the consent of the master, the object of the act would be defeated. Rule absolute. *Ex parte John Hill*,

The stat. 2 Geo. 2. c. 28. is not complied with by the clerk serving part of the time with another attorney, with his master's consent, and the rest of the time with his master.

one, &c. 7 Term Rep. 456. Mr. J. Lawrence mentioned a case, Ex parte Thomas, M. 38 Geo. 3, from Penzance. There an attempt was made to support a service with an attorney, by shewing that the party, who lived in Penzance, at a distance from the attorney, had occasionally done his business for him there in the county court; but the court held, that was not sufficient. Ibid.

The clerk should continue serving his master the whole time of probation required. *Ashhurst, J.*

Quaker.

A Quaker having served a clerkship for five years, as before mentioned, to an attorney or solicitor, may be admitted an attorney on his affirmation. *12 Geo. 2. c. 13. sect. 18.*

The oath.

I A. B. do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.

So help me God.

No attorney being a prisoner, to commence or prosecute any action.

No attorney, who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall, *during his confinement*, in his own name, or in the name of any other, *sue out any writ or process, or commence or prosecute any action or suit*, and all proceedings in such action or suit shall be void and of no effect; and such attorney so commencing or prosecuting any action or suit as aforesaid, shall be struck off the roll, and be incapacitated from acting as an attorney for the future. And any attorney permitting or empowering any such attorney as aforesaid, to commence or prosecute any action or suit in his name, shall be struck off the roll, and be incapable of acting as an attorney for the future. *Stat. 12 Geo. 2. c. 13. sect. 9.*

Any attorney permitting, &c.

Not to extend to suits before confinement.

This not to prevent any attorney confined as aforesaid, from carrying on or transacting any suit or suits commenced *before the confinement of such attorney. Sect. 14.*

May commence an action on a bail-bond.

After action commenced by an attorney he becomes a prisoner, then the bail-bond is assigned, and he being still a prisoner commences an action on the bail-bond: this has been held in C. P. to be a continuance, and it is only on that ground that such attorney is allowed to prosecute. *Wheetam v. Needham, Barnes, 46.*

Relates to prosecution.

It has also been held that the above act relates only to *prosecuting*, and not to the *defending of suits. Longman v. Rogers, Barnes, 263.*

Persons bound clerks to attorneys, or solicitors, are to cause an affidavit to be made and filed of the execution of the articles within *three months next after the date thereof*: and in every such affidavit shall be specified *the names of every such attorney and solicitor, and of every such person so bound, and their places of abode respectively, together with the day of the date of such articles*: and every such affidavit shall be filed within the time aforesaid, in the court where the attorney or solicitor to whom every such person respectively shall be bound as aforesaid, hath been enrolled as an attorney or solicitor, with the proper officer; and none to be admitted before such affidavit be produced and read in court. *22 Geo. 2. c. 46. sect. 3, 4.*

Persons bound to serve as clerks to attorneys to cause affidavit to be made within three months after execution of contract. None to be admitted before such affidavit produced.

In this court the secondary or his clerk shall be the proper officer for filing such affidavit, *sect. 5*; and shall keep a book, wherein shall be entered *the substance of such affidavit, specifying the names and places of abode of every such attorney and clerk, and of the person making such affidavit, with the date of the contract, and the days of making and filing such affidavit*; and may take, at the time of filing such affidavit, *2s. 6d.* for his trouble; which books may be searched gratis. *Sect. 6.*

Who are to file such affidavits, books to be kept, &c.

No attorney shall have, take, or retain any clerk, who shall become bound by contract in writing as aforesaid, after such attorney shall have discontinued or left off, or during such time as he shall not actually practice or carry on the business of an attorney. *Sect. 7.*

No attorney to take a clerk after discontinuing business.

Every person who shall become bound, &c. shall during the *whole time or term* of service, to be specified in such articles, *continue and be actually employed by such attorney or solicitor, or his or their agent or agents*, in the proper business, practice, or employment of an attorney or solicitor. *Sect. 8.*

Clerk to be employed the whole time.

This is not complied with, by the clerk serving *part of the time with another attorney, although with his master's consent*, and the *rest of the time with his master*. *Ex parte Hill, one, &c. 7 Term Rep. 756.*

How not complied with.

Provided if any such attorney, to or with whom any such person shall be so bound, shall happen to die before the expiration of such term, or discontinue or leave off his practice, or if such contract shall by mutual consent of the parties, be cancelled, or such clerk shall be legally discharged by rule of the court, before the expiration of such term; and the said clerk shall, in any of the said

If, before the expiration of the time, the attorney dies, &c. or the clerk be discharged by, &c.

and be bound to serve for the remainder of the time ;

such service to be good, if affidavit be made and filed, &c.

cases, be bound by another contract or contracts in writing to serve, and shall accordingly serve in manner before mentioned, as clerk to any other such practising attorney or attornies as aforesaid, during the residue of the said term of five years, then such service shall be deemed and taken to be as good, effectual, and available, as if such clerk had continued to serve as a clerk, for the said term to the same person to whom he was originally bound, *so as affidavit be duly made and filed of the execution of such second contract or contracts, within the time and in like manner as is before directed, concerning such original contract.* Sect. 9.

Before admittance of an attorney, affidavit to be made and filed of actual service.

Every person who shall become bound as a clerk, shall, before he be admitted an attorney, cause an affidavit of himself, or such attorney to whom he was bound as aforesaid, to be duly made and filed with the officer before appointed, that he *hath actually and really served and been employed by such practising attorney*, to whom he was bound as aforesaid, or his agent, *during the said whole term of five years.* Sect. 10.

Attorney acting as agent, or permitting his name to be used, or sending any process to an unqualified person, thereby enabling him to appear or act as an attorney, to be struck off the roll.

If any sworn attorney shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be in any ways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practice in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof, in a summary way to the court from whence such process did issue, and proof made thereof upon oath to the satisfaction of the court, that such sworn attorney had offended therein as aforesaid, then every such attorney so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor ; and in that case, and upon such complaint and proof made as aforesaid, it shall be lawful for the said court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year. Sect. 11.

If attorney's name be set to process without his authority, or a judgment entered, proceedings will be set aside.

But where an attorney's name was set to process, *without his authority*, the court ordered the proceedings to be set aside, and granted an attachment against the plaintiff's attorney. *Oppenheim qui tam v. Harrison*, 1 Burr. 20. So judgment was entered up by an attorney's clerk, in the name and *without the knowledge*

or consent of a regular attorney, it was ordered to be set aside. *Hopwood v. Adams*, 5 Burr. 2660.

No person shall act as a solicitor, attorney or agent, or sue out any process at any general or quarter sessions of the peace, either with respect to matters of a criminal or of a civil nature, unless such person shall have been heretofore admitted an attorney of one of the courts of record at *Westminster*, and duly enrolled pursuant to *stat. 2 Geo. 2. c. 23.*; or be hereafter admitted an attorney, and enrolled as aforesaid, pursuant to this act, or such other law as shall be then in being; and unless such person shall continue so entered on the roll at the time of such his acting in the capacity aforesaid: but every person who shall so act, not being admitted and enrolled as aforesaid, shall be subject to a penalty of fifty pounds, to be recovered by action of debt, bill, &c. by any person who shall sue for the same, within twelve months after the offence committed, with treble costs of suit. And if an attorney shall permit any person, not being admitted and enrolled as aforesaid, to make use of his name in the courts of general or quarter sessions as aforesaid, such attorney shall be subject to the like penalty of fifty pounds, to be recovered as aforesaid. *Sect. 12.*

Provided that nothing herein shall extend to deprive the attornies of the duchy of *Lancaster*, or of the courts of great sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, and *Durham*, from acting within their respective jurisdictions. *Sect. 13.*

An attorney that has not been attending his employment in this court by the space of one year, unless hindered by sickness, shall not be allowed his privilege of an attorney. *R. M. 1654. Sect. 1.*

Attornies dismissed by one court from their practice for misdemeanor shall not (after certificate) be admitted to practice in another court, it being contrary to the intent of the law. *Ibid.*

No attorney to be lessee in an ejectment, nor bail for a defendant in this court. *R. Mich. 1654. Sect. 1.*

No person, without rule of court, or order of a judge, and notice to the adverse party or his attorney, shall change or shift his attorney; and such attorney newly coming in, to take notice at his peril of the rules whereunto the former attorney was liable, had he continued. *R. Mich. 1654. Doug. 217. Say. 218. Black. 8.*

Nor till the former bill be paid. This court will not permit an attorney to be changed in a cause, and another attorney appointed in his stead, *till his bill of fees and disbursements be settled and paid.* 12 Mod. 440. 8 Mod. 306.

Need not have an order to change the attorney on bringing a writ of error. The court were of opinion, that the defendant, in the original action, need not obtain a judge's order to change his former attorney, upon bringing a writ of error. *Batchelor v. Ellis*, 7 Term Rep. 337.

Where the attorney dies. Where the attorney for the plaintiff or defendant dies, pending the suit, and the party whose attorney is dead, will not retain another attorney, the cause against him may proceed, and is not bound to hinder his client's cause. *Sty. Prac. Reg.* 13.

How long the authority continues. The authority of an attorney continues *until judgment* (where no order has been obtained to remove him) and for a year and a day afterwards to sue out execution, and for a longer time if the party continues in execution; but if not, the judgment is supposed to be satisfied: and to make it appear otherwise, the plaintiff must again come into court, which he either does by *scire facias*, or by an action of debt on the judgment. *Comb.* 40. *Sty.* 426. And then a new authority is necessary. *Salk.* 86.

Sci. fa. a new action may be sued out by a new attorney without leave or notice. But as a *scire facias* is a new action, it may be sued out by a *new attorney without leave of the court* for changing the attorney, or giving notice that the old attorney is changed. *Hussey v. Welby*, *Sayer Rep.* 218.

Not compellable to appear, but if he undertakes must. An attorney is not compellable to appear for any one, unless he undertakes so to do; *if he undertake*, and does not file *the appearance*, upon summons before a judge he shall be compelled, or by motion. 6 Mod. 89. *Str.* 693. 12 Mod. 256. He is bound if for an infant. *Str.* 114.

H. T. 1768. Friday next after the octave of the purification of the Blessed Virgin Mary, in the 8th year of King George the Third.

Rules respecting attorneys entering their names in the book, and where notices, &c. are to be served. *Whereas the habitations of many attorneys practising in this court, resident in and near the cities of London and Westminster, are often very difficult to be found, whereby it is impracticable to serve them with notices, summonses, orders and rules, to the great delay of the proceedings in this court; for remedy whereof for the future, it is ordered, that the master shall forthwith cause to be prepared a proper alphabetical book for the purposes after mentioned, and that the same shall be publicly kept at the master's office in the King's Bench Walks, there to be inspected by any attorney, or his clerk, without fee or reward. And that every attorney practising in this court*

and residing in *London* or *Westminster*, or within ten miles of the same, shall, before the first day of the next term, enter into such book (in alphabetical order) his name and place of abode, or some other proper place within the cities of *London* or *Westminster*, where he may be served with such notices, summonses, orders, and rules. And every attorney afterwards to be admitted, and practising and residing, as aforesaid, shall upon his admission make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be so served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules, which do not require a personal service, shall be deemed sufficiently served on such attorney, if a copy thereof shall be left at the place lastly entered in such book, with any person resident at, or belonging to such place. And if any such attorney shall neglect to make such entry, that then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney in the said master's office, shall be deemed a sufficient service, unless the matter shall be such as requires a personal service. And it is further ordered, that a copy of this rule shall be publicly fixed up in the said master's office, and that another copy thereof shall also be fixed up in the chambers of each of the judges of this court.

N. B. It is expected that such practisers who live remote from the *Temple*, shall add to the place of their abode, where, and with whom notices, summonses, orders, rules, and other proceedings, that do not require personal service, may be left near any of the inns of court or chancery.

As many attornies have no certain place of residence, any *place*, where he may be *served*, though not in his actual place of abode, is *sufficient*. But when the *name* and *place of abode* is entered, then *service* at that *place* is the proper service. *Loft. Rep.* 357.

Annual Certificates.

By stat. 25 Geo. 3. c. 80. After the first of *November* 1785, there shall be raised and levied the rates and duties following; that every solicitor, attorney, notary, proctor, agent, or procurator, admitted, enrolled, or registered in any of his majesty's courts at *Westminster*, or in any ecclesiastical court, or in any of the courts of admiralty

Certificates to be taken out annually by every solicitor practising in any court holding pleas for 40s. and upwards.

or cinque ports, or in any of his majesty's courts in *Scotland*, the great sessions in *Wales*, or in any courts in the counties palatine, or in any other courts in *Great Britain*, holding pleas, where the debt or damage shall amount to 40s. or more, shall, previous to his commencing or defending any suit or prosecution, take out annually a certificate of such his admission, enrolment, or register: that for and upon every such certificate so taken out by any solicitor, &c. who shall reside in any of the inns of court, or in the cities of *London* or *Westminster*, the borough of *Southwark*, the parish of *Saint Pancras*, and *Saint Mary la Bonne*, or within the bills of mortality, or within the city of *Edinburgh*, there shall be charged a stamp duty of 5l. and in any other part of *Great Britain* 3l.

Those residing in London and Westminster, the bills of mortality, or Edinburgh, to pay 5l. for a certificate; any other part, 3l.

From Nov. 1785, every acting solicitor, &c. shall annually deliver in a note of his name and residence, &c. in order to obtain a certificate.

After the first of *November*, 1785, every person admitted, sworn, enrolled, or registered a solicitor, attorney, &c. in any one or more of the courts aforesaid, who shall commence, carry on, or defend any action, suit, or prosecution therein, shall annually, during such time as he shall continue so to practice therein, deliver into some one of the courts, in which he shall have been admitted, sworn, enrolled, or registered, in such manner as is hereinafter directed, a paper or note, in the proper hand-writing of every such solicitor, &c. containing his name and usual place of residence, and marked and stamped with the proper mark or stamp, denoting the duty herein-before imposed upon certificates, according to the place of such his residence as aforesaid; and thereupon every such solicitor, &c. shall be entitled to have a certificate (if the same shall be required) in the manner herein-after directed. *Sect. 3.*

Officers for entering application for certificates in England.

The chief clerk of the King's Bench, or his deputy, the clerk of the warrants in the court of Common Pleas, or his deputy, the clerk of the pleas in the Exchequer office of pleas, or his deputy, the prothonotaries of the respective counties palatine of *Lancaster*, *Chester*, and *Durham*, and of the great sessions in *Wales*, or their respective deputies, and such officers of the inferior courts of law as the judge or judges of the inferior courts respectively shall appoint, the senior clerk of the petty bag office in the court of Chancery, or his deputy, the king's remembrancer of the court of Exchequer, or his deputy, the chief clerk of the duchy chamber of *Lancaster*, or his deputy, the register of the respective courts of equity in the said counties palatine, and of the great sessions in *Wales* or his deputies, shall, and they are hereby required, from

time to time, upon payment of 1s. to enter the name and place of residence of such attorney, &c. and who shall have delivered in such paper or note in writing, duly stamped, and required a certificate of his enrolment as expressed, in rolls or books to be provided and kept for that purpose in the said several and respective offices: and such officers shall subscribe to every such paper or note in writing, so delivered in, a certificate signed by every such officer respectively, according to the form of the schedule annexed; to all which said rolls or books, in the said courts respectively, all persons shall and may, at all seasonable times, have free access, without fee or reward. *Sect. 4.*

Entering of-
ficers to certi-
fy notes de-
livered.

Every certificate shall bear date on the day on which the same was issued, and shall endure and remain in force for the space of twelve calendar months, to commence from the first of *November, 1785*, upon all certificates to be issued on or before that day, and upon certificates to be first issued to any person or persons, after the said first day of *November, 1785*, to commence from the date of every such certificate; which said certificate shall be renewed at least ten days previous to the expiration of the time for which it was granted, and so yearly and every year, so long as such solicitor, &c. shall continue to practice in any such court or manner as aforesaid. *Sect. 5.*

Entering offi-
cers, &c. to
issue annual
certificates,
which must be
renewed ten
days before
expiration.

Persons residing in any of the *inns of court*, or in the cities of *London* or *Westminster*, or the borough of *Southwark*, the parish of *Saint Pancras*, or *Saint Mary la Bonne*, or within the *bills of mortality*, or within the city of *Edinburgh*, for the space of *forty days*, or more, in any one year, every such solicitor, &c. shall be deemed to be resident within the limits of the different districts, and shall be liable to the higher duties imposed on certificates, notwithstanding such solicitor, &c. shall or may at other times in each such year, reside elsewhere without the limits last mentioned. *Sect. 6.*

Persons resid-
ing forty days
in the year
within the
limits of the
higher duties.
are to pay the
same.

This does not extend to the sheriff's court, though an attorney prosecute a suit there by *justices*. *Cross v. Kay*, 6 Term Rep. 663.

Penalty of 50l. on every person who shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings as a solicitor, &c. in any of the courts aforesaid, for or in respect of any gain, fee, or reward, without having obtained such

Penalty on
acting with-
out certificate,
or giving in a
false place of
residence.

certificate, or shall deliver in to the respective officers appointed, any false or fictitious place of residence, with intent to evade the payment of the higher duties: and made incapable to maintain or prosecute any action in any court of law or equity, for the recovery of any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding. *Sect. 7.*

Persons having taken out certificates, may act for others who have also taken them out.

Any person having duly obtained a certificate, may sue or defend any action in the name and by consent of any other solicitor, &c. of such court in writing first had and obtained, and signed by him in like manner as he might have lawfully done before this act, provided such solicitor, &c. in whose name such proceedings shall be instituted, commenced, or carried on, shall also have first duly obtained a certificate out of the court wherein he is sworn, &c. in manner as hereinbefore is directed; or in default thereof, every such solicitor, &c. shall be liable to the like penalties, &c. as any other solicitor is by this act made subject and liable to. *Sect. 8.*

Persons under one certificate may act in any other court in which he is sworn, &c.

It shall and may be lawful for any person duly sworn, admitted, &c. a solicitor, &c. in any two or more of the said courts respectively, under a proper certificate obtained from either of the said courts respectively to commence or defend any action or suit in any of the said other courts in which he is so sworn, &c. although such certificate shall or may not have issued from such other court. *Sect. 9.*

A stamped memorandum to be given to the proper officer of the names of parties, &c. in every action.

No attorney, &c. shall be permitted to *sue* out process, or commence or carry on any suit or other proceedings, or *defend*, for gain, fee, or reward, unless he shall have delivered a memorandum, duly stamped, to the proper officer, containing the *names* of the *parties* in every action, with *the name of the attorney and agent* retained to prosecute or defend, to be filed of record. *Sect. 13.*

The like to be delivered in such cases as used to require præcipes.

The like memorandum in all cases where any præcipe (except a præcipe for any original writ issuing out of the court of Chancery) is or shall be required by the rules of any of the courts, to be filed, &c. previous to the signing or issuing any such original or other writ, &c. or other first process for any plaintiff upon the commencement of any such suit or action, or any prosecution or other proceeding, it shall be lawful for every solicitor, attorney, &c. to deliver in to every such clerk, or officer, the memorandum required to be stamped, and to insert therein the nature of the process required to be signed, and the return thereof: and that every memorandum so

stamped and delivered, shall be as valid, for the signing such writ, &c. or other first process, as if the præcipe used in such courts, had been delivered in to the proper clerk. *Sect. 14.*

The officer who receives the memorandum, is to file the same on pain of 50l. and insert the day of the month he receives same, without any fee. *Sect. 15.*

Officers who receive them to file the same.

Every person who shall sue out any writ, or commence, solicit or defend, any act, action, suit, prosecution, or other proceedings, (except as after mentioned,) without having delivered to the proper officer, to be entered or filed of record, the memorandum or minute of his warrant, stamped, shall forfeit 5l. *Sect. 16.*

Persons not acting conformable to this act, forfeit 5l.

That no action, &c. shall be staid, nor any judgment reversed, by reason of any omission or defect in entering or filing the memorandum, but the courts shall proceed therein as if the same was filed. *Sect. 17.*

Actions are to proceed, though the memorandum should not have been entered or filed.

This act not to extend to alter any of the rules used relative to the filing warrants of attorney, appearances, or any admissions to sue or defend any actions depending. *Sect. 18.*

Practice of the courts of law, &c. not altered unless the judges think fit.

In all cases where any defendant shall, *before appearance*, confess any action or suit, or shall execute any warrant of attorney to acknowledge judgment by *nil dicit*, *non sum informatus*, or otherwise, the attorney who shall enter up any judgment thereupon, shall previously deliver to the proper officer a memorandum or minute of such *cognovit actionem*, or warrant of attorney, stamped, under pain of 5l. *Sect. 19.*

A stamped memorandum to be filed on judgments on warrant of attorney, or confession, if no appearance.

Persons not immediately employed by the parties themselves may charge the duties to the attornies for whom they act. *Sect. 21.*

Agents.

Common appearances and common bail may be filed by the plaintiff for the defendant, according to the statute; without filing such memorandum for the defendant. *Sect. 22.*

Appearance according to statute or common bail.

But no attorney, after such appearance, or bail, according to the statute, shall have been entered, shall plead or carry on any further proceedings without such memorandum be filed to defend, on pain of 5l. *Sect. 23.*

But no attorney shall defend after appearance or bail filed, without the memorandum is filed.

If any person shall be added, by rule or order of the court, it may be lawful for the attorney for the plaintiff to sue out the usual process against such person so added,

If a defendant be added.

without a new memorandum or minute, by specifying in the præcipe, that the defendant named therein hath been added thereto by rule or order. *Sect. 24.*

On putting in special bail, the memorandum is to be delivered to the clerk.

The memorandum to be delivered to the judge's clerk at the time of putting in of special bail, who is to deliver the same to the proper officer to file bails within six days after the end of each term, who is to be paid 2d. in the pound. If he neglects to forfeit 50l. *Sect. 25.*

Not to extend to inferior courts, under 40s.

This act not to extend to any suit wherein the debt or damages shall not amount to 40s. *Sect. 26.*

Nor to suits by attorney-general, except, &c.

Nor to any suits carried on in his majesty's name, or at the instance of the attorney-general, (save information of *quo warranto*, or where private persons are interested.) *Sect. 27.*

Penalties.

Penalties by this act are to be recovered by action of debt, bill, plaint, or information, in any court of record at *Westminster*, with full costs.

General issue.

General issue to be pleaded, and defendant, if he have a verdict, to have treble costs, or if there be a nonsuit. *Sect. 29.*

His privilege continues only while he practices, and has a certificate.

The privileges of an attorney only continue while he is a *practising attorney*, and while he has the *certificate required*; and therefore it was ruled, that an attorney who had not practised for several years, might be arrested, though *after* the suing out of the writ, and before the arrest, he *recommenced his practice*, and took out a *certificate*. *Brooke v. Bryant, one, &c. 7 Term Rep. 25. Sect. 36.*

May sue by common process.

An attorney may sue by common process, and endorse his own name on the copy, as the attorney, and may afterwards declare by *another attorney*. *Jackson v. Barnard, 7 Term Rep. 35.* Plaintiff sued out an original, a copy of which he served on defendant, endorsed *J. Jackson*, in person. He then declared, by his attorney, *H. Rosser*, and gave notice of declaration in the name of *J. Jackson*.—I never before understood this to be the practice. I always understood, that if he sued *on common process*, or by *original*, he was obliged to sue by a *regular attorney*.

He may sue by attachment when in prison.

An attorney, *when in prison*, may sue by attachment of privilege for a debt of his own, notwithstanding the statute, 12 Geo. 2. c. 13. sect. 9. *Kaye, one, &c. v. Denev, 7 Term Rep. 671.*

Where both parties are attornies of the same court, the plaintiff cannot hold the defendant to bail. If he do the court will *discharge the defendant* out of custody, and order all proceedings to be staid, without costs. *Nicholls v. Earl*, 8 Term Rep. 395.

Where both are attornies of the same court, no bail.

An attorney has no privilege against a foreign attachment. *Ridge v. Hardcastle*, 8 Term Rep. 417.

No privilege against a foreign attachment.

Rules as to future Admissions, and the new Acts of Parliament as to Contracts for Clerks, and their Admission, and taking out Certificates.

It is ordered, that from and after the last day of *Michaelmas* term next ensuing, no attorney who shall be retained or employed as a writer, or clerk, by any other attorney shall, during the time of such employ, take or have any clerk under articles; and that no service to any such attornies under articles, during the time that such attorney shall beso employed by any other attorney, shall be deemed good service; (a) and it is further ordered, that from and after the same last day of *Michaelmas* term, no person who shall enter into articles with an attorney or

Rule respecting clerks, and their future admission.

(a) *Mr. Baldwin*, after adverting to the above rule, desired the opinion of the court upon the subject of an articulated clerk who had served an attorney for three years, *who was a clerk to another attorney*, whether the rule in question was intended to have a *retrospective operation* with respect to services *already* performed, or merely to *such* as were to commence from the *present Michaelmas term*. The former construction would press hard upon individuals who had already served a great part of their time in this manner, under a general persuasion, *warranted by the common practice*, that *such* service was valid. The court said, that the rule, which was only made in conformity to, and in furtherance of the act of parliament, could not be limited in restraint of *future services* of this nature only; for the mischief intended to be remedied, was the admission of improper persons as attornies; which required as much to be prevented *now*, as at any *future* time; and no hardship could be complained of, as the rule was not introductive of any *new* regulation, but *confirmatory of an old one*. 4 Term Rep. 492. *Mic. 32 G. 3.*

The exposition of the first part of the rule.

21 Geo. 2.
c. 46. s. 7.

Service with
the agent.

attornies, shall be at liberty to serve the agent or agents of such attorney or attornies, under such articles, for a longer time than any one year of his clerkship; and that any such service to an agent or agents *beyond* that time, shall not be deemed good service. And to the intent that better information may be obtained touching the fitness and qualifications of persons applying to be admitted attornies, *it is further ordered*, that, from and *after the said last day of Michaelmas term*, every person who shall intend to apply for admission as an attorney in this court, and who shall not have been admitted an attorney or solicitor of any other court, shall for the space of one full term, previous to the term in which such person shall apply to be admitted, cause his name and place of abode, and also the name or names, and place or places of abode, of the attorney or attornies to whom he shall have been articulated, written in legible characters, to be affixed on the outside of the court of King's Bench in such places as public notices are usually affixed ^b; and also in some conspicuous place in the chambers of each of the judges of this court, and in the King's Bench office: and that no person who shall not have regularly complied with this order, shall in future be admitted an attorney of this court. *Trin. Term, 31 Geo. 3.*

^bVide the next
rule.

By the court.

New rule re-
specting at-
tornies, Trin.
Term, 33 Geo.
3.

Whereas, by a rule made by this court in *Trinity* term, in the 31st year of his present majesty, *it was ordered*, (amongst other things,) that every person who should after the then next *Michaelmas* term intend to apply for admission as an attorney in this court, should, for the space of one full term previous to the term in which such person should apply to be admitted, cause his name and place of abode, and also the name or names, or place or places of abode of the attorney or attornies to whom he should have been articulated, written in legible characters, or be affixed on the outside of the court of King's Bench, and also in some conspicuous place in the chambers of each of the judges of this court, and in the King's Bench office, and that no person who should not have complied with this order, should in future be admitted an attorney of this court. *And whereas*, inconveniences have arisen by the above practice, to remedy the same, *it is hereby ordered*, that every person who shall, after the expiration of this term, intend to apply as above stated shall comply with the above in part recited rule, (except as to fixing up his name and place of abode in the

Instead of
fixing up no-
tices, to enter
up name and
place, &c.
in a book at

judges' chambers,) and shall instead thereof, for the each of the space of one full term, previous to the term in which judge's chambers such persons shall apply to be admitted, enter, or cause to be entered, in a book to be kept for that purpose, at each of the judge's chambers of this court, his name and place of abode, and also the name and place of abode of the attorney or attorneys to whom he shall have been articulated: and that no person who shall not have complied with this rule, shall in future be admitted an attorney.

By the court.

The notice must be entered the *day before the first day of the term*, and so must the notice to be stuck up.

"Notice is hereby given, that A. B. of, &c. now under The form of articles of clerkship to C. D. of, &c. attorney at law, the notice. intends to apply next Easter term to be admitted an attorney of his majesty's court of King's Bench. Dated this day of , 1817."

By stat. 34 Geo. 3. c. 14. *within the bills of mortality*, After Feb. 5, from and after Feb. 5, 1794, and in every other part of 1794, within England and Wales, after Feb. 10, 1794, there shall be the bills of raised, &c. for and in respect of every contract in writing mortality, and made after the 5th and 10th of Feb. 1794 respectively, whereby any person shall become bound to serve as a clerk in order to his admission as a solicitor, or attorney in any of the courts of law or equity, in pursuance of the laws now in force for regulation of solicitors and attorneys, the new and additional rates and duties following, over part of England the following stamp duties to be paid. and above all other rates, &c. payable by law, upon or in respect of the same, (that is to say,) For and upon every piece of vellum or parchment, or sheet or piece of paper, on which shall be engrossed, printed, or written, any such contract made, whereby any person is or shall become bound to serve as a clerk as aforesaid, in order to his admission as a solicitor or attorney, in any of his majesty's courts at Westminster, there shall be charged a stamp duty of 100l. And in order to his admission as a solicitor or attorney in any of the courts of great sessions in Wales, or in the counties palatine of Chester, Lancaster, or Durham, or in any court of record in England, holding pleas to the amount of 40s. and not in any of the said courts at Westminster, there shall be charged a stamp duty of 50l. Sect. 1.

For every contract as a clerk in any court at Westminster 100l.

Great sessions in Wales, &c. holding pleas where the debt shall amount to 40s. 50l.

And no person who is or shall be bound to serve as a clerk after the said days, shall be admitted to be a solicitor or attorney, unless the indenture or other writing containing such contract, stamped according to this act, denture be

No clerk shall be admitted, unless the indenture be

enrolled with
an affidavit
within six
months, &c.

shall be enrolled or registered with the proper officer of the court, to be appointed for that purpose, in the court wherein such person shall propose to be afterwards admitted a solicitor or attorney by virtue of his service under such contract, together with an affidavit of the time of the execution of such contract by such clerk; and in case the same shall not be so enrolled or registered within six months after execution thereof, together with such affidavit of the time of the execution of such contract, then the service of such clerk, under such indenture or writing, shall be deemed to commence from the time of such enrolment, or registry, only, and not from the execution of such indenture or writing. Sect. 2.

Every such
clerk, previous
to his being
permitted to
practice, shall
make an affi-
davit of the
payment of
the duty, &c.

That every person *to be admitted* a solicitor, or attorney, in any of the said courts by virtue of any such contract made after the 5th and 10th of Feb. 1794, respectively, and service under the same, before he shall be permitted to practise as a solicitor or attorney in such court, or to be enrolled or registered therein, shall make an affidavit of the due payment of the duty imposed, and shall assert in such affidavit the sum paid in respect thereof, and shall also specify the name and place of abode of the person, &c. with whom such contract of service was entered into, the time of the execution thereof, and the time of enrolling or registering the same; and in case such person shall have been previously admitted a solicitor or attorney in some other court, shall also specify in such affidavit *the court in which he has been so admitted, and the time of his admission therein*; and shall cause the same to be duly filed in the court in which he proposes to be so admitted a solicitor or attorney, with the proper officer (for receiving such affidavits;) and every such affidavit shall be produced and read in the court in which such person shall be admitted a solicitor or attorney, before he shall be enrolled or registered therein. *Sect. 3.*

If any person
not admitted
in one of the
courts of
great sessions,
&c. by virtue
of a contract
prior to the
days before
mentioned,
shall in his
own or ano-
ther name,

That in case any person other than such person who shall have been admitted an attorney or solicitor in one of the courts of great sessions in *Wales, Chester, Lancaster, or Durham*, or other courts of record in *England*, where attornies have been customarily admitted by virtue of a contract made before the 5th and 10th of Feb. 1794, and a service in pursuance, or who shall have been admitted a solicitor in one of the said courts of great sessions, or of the said counties palatine, or some other inferior court of equity in *England*, by virtue of a like contract and service, according to the directions of the several acts,

shall, in his own name, or in the name of any other person, sue out any writ or process, or prosecute or defend any suits, in any of the courts at *Westminster*, for or in expectation of any gain, &c. without being admitted and enrolled an attorney or solicitor in one of the said courts at *Westminster*, such person, &c. shall forfeit 100l. with full costs; one moiety to the king, the other to the informer, to be recovered by action of debt, bill, plaint, suit, or information, in any of the courts of record at *Westminster*, wherein no protection, wager of law, nor more than one imparlance shall be allowed: and such person is hereby also made incapable to maintain or prosecute any action or suit in any court of law or equity, for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit or proceeding. *Sect. 4.*

That any person who shall have been admitted in any court at *Westminster* by virtue of such contract, and shall have paid the duty of 100l. may be admitted in all or any of the courts before mentioned, without payment of any further duty. *Sect. 5.* Subject to all and every the provisions prescribed by law with relation to the admission of solicitors and attorneys in such courts respectively before the passing this act.

Also that any person who shall be admitted in any of the courts of *great sessions*, or *counties palatine*, or in any *inferior court*, by virtue of such contract, and who shall have paid the duty of 50l. may be admitted in all or any of the courts aforesaid, (except the courts at *Westminster*,) without payment of any further duty. *Sect. 6.* Subject to the like regulations.

That any person who shall have been admitted a solicitor, or attorney, in any of the courts aforesaid, by virtue of any contract *bond fide* made, and of his service under the same, actually commenced before the 5th and 10th Feb. 1794, may be admitted a solicitor, or attorney, in all or any other of the courts aforesaid, *without payment of any stamp duty* by this act imposed, in such manner, and subject to such regulations as he might have been admitted therein before this act. *Sect. 7.*

mentioned, may be admitted in any other of them without further duty.

If any person having been articulated to any attorney or solicitor, for five years, and having duly paid the duty by this act imposed, (in case such articles should have been entered into after the 5th or 10th of Feb. 1794 respectively,) shall, on the event of such attorney or solicitor dying or

sue out any writ, &c. in the courts at *Westminster*, without being admitted in one of them, he forfeits 100l.

Persons admitted in any court at *Westm.* who shall have paid the 100l. may be admitted in any other court without further duty.

As also persons admitted in any court of *great sessions*, &c. who shall have paid the duty of 50l. (except the courts at *Westminster*.)

Persons admitted in any of the courts aforesaid by virtue of contracts made prior to the days before further duty.

Articled clerks having paid the duty, shall not be subject to any duty for new

contracts with *leaving off his practice*, or of such articles being cancelled or discharged, or on any other event, before the expiration of such term of five years, enter into any subsequent contract with any other attorney or solicitor, to serve him as his clerk, for the residue of the said five years, such *last contract* shall *not* be subject to or chargeable with any of the duties by this act imposed. *Sect. 8.*

Contracts before engrossed to be stamped. That all vellum, &c. liable to said duties, shall, *before same be engrossed*, be brought to the office and duly stamped. *Sect. 10.*

But only one part need be then stamped, and the duplicate shall be stamped after execution, on proof of payment of duty. But when any such contract shall be made by indentures of different parts, it shall be sufficient to stamp *one part only*, and the commissioners shall provide one other stamp, to be put on the *duplicate*, which shall not have been so stamped, and cause such other part to be stamped, *on sufficient proof being made to their satisfaction of the payment of the duties at any time after the execution*, which stamp is to be distinguishable from any other stamp used by them by virtue of this or any other act: and every such other part stamped as aforesaid, shall be as available in the law, and of the like force, as if same had been stamped before the engrossing, &c. *Sect. 11.*

Usual allowance. The usual allowance is to be made on present payment, as by any former law. *Sect. 12.*

The powers of former acts relating to stamp duties to extend to this act. *Sect. 51.*

From 1st Nov. 1797, every solicitor, &c. in the courts at Westminster, and certain other courts, shall between 1st Nov. and the end of Mich. term annually deliver at the head office for stamps, a note, containing his name and abode, in order to obtain a certificate. *By stat. 37 Geo. 3. c. 90.* reciting the title of the act 25 Geo. 3. c. 80. and for avoiding frauds, it is enacted, that after the 1st Nov. 1797, every person admitted, sworn, enrolled, or registered a solicitor, attorney, &c. in any of his majesty's courts at Westminster, &c. shall annually, between the 1st November, and the end of Michaelmas Term, then next, during such time as he shall continue so to practice in any of the said courts, or before such persons shall commence, carry on, or defend, any action or suit, or any proceedings whatsoever in any of the said courts, deliver in to the commissioners appointed to manage the duties on stamped vellum, &c. or to their officer appointed by them, at the head office of stamps, in Middlesex, a paper, or note, in writing, containing the name and usual place of residence of such person: and upon payment of the duties by the said act imposed; according to the place of his residence described in such paper or note, in writing, every such person shall be entitled to a certificate duly stamped, to denote

the payment of the duty, &c. which certificate the commissioners, or person appointed, shall cause to be immediately issued, under the hand and name of the proper officer, in such form as the commissioners shall devise. *Sect. 26.*

By 54 Geo. 3. c. 144. it is enacted that in future the certificates for attornies, &c. shall be annually taken out between the 15th Nov. and the 16th Dec. in each year, and that all such certificates shall in future expire on the 15th Nov.

When certificates to be taken out.

Every such certificate shall be entered in one of the courts in which the person described shall be admitted, enrolled, sworn or registered, with the respective officers of the said courts appointed, within the time prescribed, or before such person shall be permitted to practice as aforesaid. The officer to enter same, on payment of 1s. and the books may be inspected gratis. *Sect. 27.*

Certificates to be entered with the proper officer of the court, who shall be paid 1s. for the entry.

After 1st Nov. 1797, if any person shall, in his own name, or in the name of any other person or persons, sue out any writ of process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings in any of the courts aforesaid, for fee or reward, or shall do any act in any of the said courts as an attorney, solicitor, &c. without obtaining a certificate in manner directed, or without entering same in one of the courts aforesaid, wherein such person shall be admitted, enrolled, &c. or shall deliver in to any person at the said head office, any account, containing a place of residence, as the place of his residence, contrary to 25 Geo. 3. c. 80, with intent to evade the payment of the higher duties of 5l. every such person shall for every such offence forfeit 50l. and shall be made incapable to maintain or prosecute any action or suit in any court of law or equity, for the recovering of any fee, &c. on account of prosecuting or defending any action, &c. or having prosecuted, carried on, or defended any action, &c. or any matter or thing relating thereto, without such certificate as aforesaid. *Sect. 30.* See *Edmondson, qui tam, v. Davis, 4 Esp. Rep. N. P. 14.*

Penalty for acting after 1st Nov. 1797, without entering it, or for delivering in a place of residence contrary to the directions of 25 Geo. 3. c. 80.

Forfeit 50l. and made incapable of suing for recovery of any fees on that account.

Every person admitted, &c. who after the 1st Nov. shall neglect to obtain his certificate thereof, for one whole year, shall be thenceforth incapable of practising in his own name, or in the name of any other person in any of the said courts, by virtue of such admission, &c. And the admission, &c. of such person in any of the said courts, shall be from thenceforth null and void, provided that nothing herein contained, shall be construed to

From Nov. 1, 1797, persons neglecting to obtain certificates for a year, are rendered incapable of practising: but they may be re-ad-

mitted on payment of the duty and a penalty. prevent any of the said courts from re-admitting any such person, on payment, to the said commissioners, of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money, by way of penalty, as the said court shall think fit to order and direct. Provided, also, that nothing hereinbefore contained, shall be construed to include within the regulations of this act, respecting such persons as last aforesaid, any person who is exempted by the provisions of the said act of the 25th year aforesaid, from the payment of the duty imposed thereby.

Limitation of actions. Actions to be brought *in six calendar months after fact committed*; and to be brought into the county *where cause of action shall arise, and not elsewhere*: and defendant may plead the general issue, and if found not guilty, to have treble costs.

The duties payable upon articles of clerkship, admittance, and certificates. By stat. 55 Geo. 3. c. 184. *articles or contract* whereby any person shall become bound, as a clerk, in order to his admission as a solicitor, or attorney, in pursuance of laws now in force in any of his majesty's courts at *Westminster* to have a duty of - - £120. 0 0

In *Wales, Chester, Lancaster, or Durham,* or other court of record in *England,* holding pleas amounting to 40s. not being in any of the courts of *Westminster* 60 0 0

And for any counterpart or duplicate thereof 1 15 0

New articles, or contract, on the death of any former master, or for any other cause 1 15 0

And for any counterpart or duplicate thereof 1 15 0

Admittance of any attorney, &c. in any court whatsoever in *England* - 25 0 0

Certificates taken by any solicitor, attorney, &c. within *London* and *Westminster,* or within the limits of the 2d. post, or within the city of *Edinburgh,* if he has not been admitted three years, yearly - 6 0 0

If he has been admitted three years or more 12 0 0

In any *other* part of *Great Britain,* out of the limits above mentioned, if not been admitted three years - - - 4 0 0

If admitted three years or more - 8 0 0

Special pleaders, draftsmen in any court of

equity, or conveyancer, in *London or Westminster*, or within the limits of the 2d. post, or city, or shire of *Edinburgh*, are to pay for a certificate yearly - £12 0 0

In any other part of *Great Britain* - 8 0 0

Every person (except serjeants at law, barristers, solicitors, attornies, notaries, proctors, agents, or procurators, having obtained regular certificates; and special pleaders, draftsmen in equity, and conveyancers, being members of one of the four inns of court, and having taken out the certificates; and except persons solely employed to engross things not drawn by themselves; and except public officers, drawing official instruments) shall forfeit 50*l.* But not to prevent persons drawing any will, or any agreement, *not under seal*, or any letter of attorney.

Attornies in the country employ agents in town to prosecute and defend suits; therefore, where country attornies are concerned as *principals*, all *declarations, pleas*, and other proceedings, should not be delivered and carried on in the *country*, but by the agents in town.

Attornies in the country employing agents in town.

In *Griffith v. Williams*, 1 Term Rep. 711. Mr Justice Buller (who has experienced in practice more than any other judge I remember) said, that where there was an agent in town, all notices are given to him, and are not sent into the country. And this court has held, that a notice of inquiry is to be given to the agent in town; and further said, *this is to be the rule in future*. *Hayes v. Perkins*, 3 East. 568.

Mr. J. Buller's opinion.

Now held that a notice of inquiry is to be given to the agent in town.

A notice of set-off must be delivered to the agent in town. See *Pract. Reg. C. P.* 280. *Taylor v. Lawson*.

But if there be no agent in town, and a plea be filed with the country attorney's name to it, a demand of plea must be made on him. *Read v. Brown*, *Pract. Reg.* 280.

I do not remember these matters disputed before, but I should hope that the courts will make a rule for this purpose, and order that all *country* attornies should employ agents in town, in all actions to be commenced, or causes depending; and also in all causes to be defended.

If the agent of the plaintiff's attorney gives the agent Time to plead.

for the defendant time to plead, the country attorney cannot sign judgment till that time be expired.

Notice of trial.

Notice of trial *must be given* in town; but a countermand may be given in the country.

No under-sheriff or clerk, &c.

"That no sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, be attorney in the king's courts, during the time that he is in office with any such sheriff." *Stat. 1 H. 5. c. 4.*

Attornies liable to be punished in a summary way.

Attornies are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for mal-practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears that the matter complained of was rather owing to neglect or accident, than design: or if the party injured has other remedy by act of parliament, or action at law. 12 *Mod.* 251, 318. 440. 583. 657. 4 *Mod.* 367.

Lord Mansfield's opinion of the profession whilst they conduct themselves with honour and integrity.

In the case of *Pitt v. Yalden*, Lord Mansfield said, that part of the profession which is carried on by attornies, is *liberal* and *reputable*, as well as useful to the public, when they conduct themselves with *honour* and *integrity*, and they ought to be protected when they act to the *best* of their *skill* and *knowledge*. But every man is liable to error; and I should be sorry that it should be taken for granted, that an attorney is answerable for *every error* or *mistake*, and to be punished for it by being *charged* with the *debt* which he was employed to recover for his client, from the person who stands indebted to him. A counsel may mistake, as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged with the debt. The counsel, indeed, is honorary in his advice, and does not *demand* a fee; the attorney may *demand* a compensation. But neither of them ought to be charged with the debt for a *mistake*. Not only counsel, but judge may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable, in cases of *reasonable doubt*. 4 *Burr.* 2061.

Lord Ch. J. Wilmut told Lord Mansfield in the case of *Russell v. Stewart* in C. P. (called *Palmer's case*) that at the setting out of the cause, he thought it very hard, and not at all reasonable, that an attorney should be made answerable for the debt, upon account of a *mere involuntary, undesigned mistake, in a nice point of practice, &c.*

3063. and he charged the jury upon the foot of a *culpable negligence*.

Lord Mansfield resigned his office the 4th June, 1788, greatly regretted by the bar, and by the attornies in particular, whom he always treated in the most courteous manner.

The ease and temper with which his Lordship administered justice, and the unquestionable impartiality of his decisions, had rendered him dear to every rank of the profession, and had placed his integrity beyond the reach of malevolence.

The powers of his mind were vast and comprehensive; his judgment was penetrating, and finely illumined by a quick and brilliant imagination; his mode of reasoning was nervous and convincing; and he displayed a subtlety of disquisition, and a depth of argument that could be equalled only by his eloquence.

Where an attorney is charged, by affidavit, with any fraud or mal-practice in his profession, contrary to the obvious rules of justice and common honesty, the court, on motion, will order him to answer the matters of the affidavit; and, in general, if he positively deny the mal-practices imputed to him, they will dismiss the complaint; but otherwise they will grant an attachment.

If an attorney being required to answer the matter of an affidavit, deny the charge, the court will dismiss the complaint.

In the case of *Crossley, and others, attornies*, they were called on to answer the matters of certain affidavits, imputing mal-practices to them, who denied the charges *positively* and *pointedly*: it was insisted that the rule must be discharged. But the court were of opinion, that it was sufficient to answer the charge in *direct terms*, for that if the story represented by the defendants were *not credible*, an attachment must be granted against them. The story told by these defendants appearing to the court highly *incredible*, an attachment was granted. 6 *Term Rep.* 701.

But if he swear in exculpation to an incredible story, they will grant the attachment.

They are also liable to be punished for base and unfair dealings towards their clients in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their client's writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their clients use, and for other such like gross

Also for base and unfair dealings.

and palpable abuse. 2 *Haw. Pl. of the Cr.* 144, 8 *Mod.* 306. 12 *Mod.* 516.

Name set without authority. An attorney's name to the process being set thereto *without his authority*, proceedings are set aside. *Oppenheim, qui tam, v. Harrison*, 1 *Burr.* 20.

Cannot be bail except in criminal cases. An attorney cannot be bail. *Dougl.* 465. Nor his clerk, 467. But in a criminal case, attorney for defendant may. *Rex v. Bowes, ibid.*

Cannot be lessee. At attorney cannot be lessee in ejectment. *Dougl.* 466.

Constable. An attorney is not compellable to serve as constable. *Dougl.* 358,

An action lies for not charging in execution. An action lies against an attorney for neglecting to charge a person in execution at his client's suit, according to a rule of court; 3 *Wils.* 325. but the court will not proceed against him for it in a summary way. 4 *Burr.* 2060.

When an attorney may be arrested. If a man hath a joint cause of action against two, one an attorney, and the other not, he must arrest both, and declare against them as in custody of the marshal. 2 *Salk.* 544. 2 *Lev.* 129.

Attorney's Lien for Costs.

May detain writings, &c. until paid. An attorney or solicitor, having fees due to him, may detain writings until his just fees are paid; *Dougl.* 104.; but if there are none due to him, the court on motion, will compel the delivery of them. 1 *Lill.* 148. But he cannot detain writings that are delivered upon special trust, for the money due to him in that very business, *Mod. Cas. L. and Eq.* 306.

An attorney has a lien on the money recovered for his bill of costs. An attorney has a lien on the money recovered by his client, for his bill of costs: if the money come to his hands, he may retain to the amount of his bill. He may stop *in transitu*, if he can lay hold of it; if he apply to the court, they will prevent its being paid over till his demand is satisfied. If the attorney gave notice to the defendant not to pay till his bill be discharged, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice. *Welch v. Hole, Dougl.* 238.

If notice is given not to pay the costs to the client, &c. A verdict was given for 20l. and error brought: the plaintiff compromised with defendant for ten guineas for the debt and costs (after he had been in gaol for two years); a motion was made for a rule to shew cause why the defendant should not pay the plaintiff's attorney's

bill; but it was discharged, because the application went to the extent of controverting the validity of a payment of the whole debt and costs to a plaintiff without the privity of his attorney; and it would be too much to say that a defendant shall not transact the business of a cause with the plaintiff himself, in a case where there has been no notice not to do so from the attorney, either express or implied. *Dougl. Rep. 238. Welch v. Hole.*

The master awarded a certain sum to be paid to the plaintiff with costs, which plaintiff threatened to take execution for, unless paid. The defendant's attornies, after notice from plaintiff's attornies not to pay it, because their bill was not satisfied, paid the whole to the plaintiff himself. Plaintiff's attornies applied for and obtained a rule to shew cause why it should not be referred to the master, to see what lien the plaintiff's attornies had upon the debt and costs recovered in this action, as against plaintiff himself, and why defendant's attornies should not pay over that sum to the plaintiff's attornies. *Lord Kenyon*: The principle by which this application is to be decided was settled long ago, namely, "that the party should not run away with the fruits of the cause, without satisfying the legal demands of his attorney," by whose industry, and in many instances at whose expence, those fruits are obtained. If the money had been paid over before notice of his lien, it would have been good; but here the payment was made in violation of the notice. *Read v. Dupper, 6 Term Rep. 361, Rule absolute.*

If defendant's attorney pay the plaintiff the debt and costs, after notice not to do so till he has been satisfied first, the former is liable to pay over again to the latter the amount of his lien on such debt and costs of the suit.

In *Welch v. Hole*, *Lord Mansfield* compared this to the case of an assignment of a chose in action, which indeed, in legal strictness, cannot be done; but still according to the rules of equity and honest dealing, if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice. *Vide Mitchell v. Oldfield, 4 Term Rep. 105. 3 Atk. 720. Turwin v. Gibson, Doug. 3d ed. 238. Griffin v. Eyles, 1 H. Black. Rep. 122.*

Attornies, and solicitors, have a lien on all papers in their hands, and judgments recovered for their costs; and in Chancery they are entitled to retain title-deeds for that purpose. In this action the plaintiff recovered a judgment against the defendant for 182l. 10s. The defendant having also recovered in another action against this plaintiff and another; on a rule to shew

If A. recover against C, and C. recover against A. and B, the court will permit C. on motion, to set off the

damages which he has recovered against those obtained by A, on his undertaking that the bill of A's attorney in the first action shall be satisfied, he having a lien on the judgment for his costs.

If there be bonds of reference, and an award in favor of plaintiff, his attorney has a lien on the money awarded for his costs upon notice, although plaintiff has received a first instalment.

cause " why the debt and costs in the latter should not be " set off against the judgment in the former action," the court held it right that the attorney in this case should be satisfied for his costs before the defendant was allowed to make the set-off. And *Buller, J.* said, when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied. *Rule absolute*, " on defendant undertaking to pay the bill, and on his " entering a remittitur in the cause in which this defendant was plaintiff." *Mitchell v. Oldfield*, 4 *Term Rep.* 124.

This cause being at issue at *York assizes*, 1800, the parties entered into bonds of reference, and the arbitrator awarded to the plaintiff 26l. to be paid by three instalments. Plaintiff's attorney served the defendant with notice to pay the amount of the damages and costs to him, and not to settle with plaintiff, or any other person, as he had a lien upon the sum awarded for his fees, notwithstanding which the defendant, on demand of the first instalment by plaintiff's attorney, when it became due, refused to pay it to him, but paid it over to the plaintiff himself, and then told the attorney he would never pay him a shilling, and he might get his costs how he could. *Rule* why he should not pay to plaintiff's attorney his costs out of the money awarded, and also the costs of the application. *Lord Kenyon*. The convenience, good sense, and justice of the thing, require that an attorney should have the same lien on damages awarded, as if they were recovered by the judgment of the court in the ordinary course of the cause. 'The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant, to cheat the attorney of his lien. *Rule absolute*, to pay the 10l. to plaintiff's attorney, and the remaining instalment when due. *Ormerod v. Tate*, 1 *East Rep.* 404.

Attorney has a lien for a general balance.

An attorney has a lien for his general balance on papers of his client which come into his hands in the course of his professional employment; therefore where C. gave his attorney a specific sum for the purpose of satisfying a debt, for which an execution had issued against his goods, at the suit of B., and the attorney paid the money to B. who thereupon delivered to him a lease which had been deposited by C. with B. as a security

for the debt: held that the attorney had a lien on it for his general balance due from C. and that such lien was not extinguished, by his having taken acceptances from C. for the amount of that balance before the lease came to his hands, some of those acceptances when the lease *did* come to his hands, having been dishonoured, and one of them taken up by the attorney. *Stevenson and another, assignees of Collis, bankrupt, v. Blacklock, 1 Maule and Selwyn, 535.*

If an attorney has been fraudulently admitted, or his misconduct has been very gross, which renders him unfit to be an attorney, the court will order him to be struck off the roll, which is not always understood to be a perpetual disability; for the court have in some instances permitted him to be restored, considering the punishment in the light of a suspension only. 1 *Black. Rep.* 122.

As to fraudulent admission, or gross misbehaviour.

An attorney was ordered to pay costs (as well as his client), having joined in an affidavit to support a frivolous complaint, and made resentful declarations which shewed him to be personally active in it. 2 *Burr.* 654. *Rex v. Fielding.*

Attorney ordered to pay costs.

If an attorney has been struck off the roll, (although at his own request) and *called to the bar*, the court will not permit him to be put on again; at least not unless he hath been disbarred upon application for that purpose to the inn of court where he was called. *Ex parte Cole, Dougl.* 113.

If an attorney has been struck off the roll, and called to the bar.

The court will lay an attorney who has been struck off the roll at his own instance, and applies to be restored, under the terms of taking no advantage of his privilege in any action then depending. *Dougl.* 114.

If he be struck off at his own instance.

An attorney was fined 500l. for taking 200l. of a person charged with forgery, to let him out of custody of the tipstaff. *Rex v. Vaughan, 1 Wils.* 22.

Attorney fined.

An attorney of this court was arrested by a latitat, and it was held that it is a motion of course to discharge him out of custody, on filing common bail. *Wheeler's case, 1 Wils.* 298.

As to motion to discharge attorney who is arrested.

But if an attorney of the C. B. is arrested by latitat, he must plead his privilege. *Snee v. Humphreys, one, &c. 1 Wils.* 306.

When must plead his privilege.

An attorney convicted of felony was struck off the roll as being an unfit person to practice. *Cowp. Rep.* 829.

An attorney convicted of

felony struck off. The conviction was five years preceding the application, and *no misconduct* imputed to him.

Court will oblige him to deliver up deeds. The court, under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. *Hughes v. Mayre*, 3 Term Rep. 275. *Sed vide* 6 East. 404. 8 East. 237.

If a third person be interested. And if a *third* person be interested in the deeds, &c. the court will take a security from the person to whom they are delivered, to produce them on demand for the inspection of such third person. 3 T. R. 275.

Costs for neglect. The court in some instances, will order an attorney to pay costs to his own client for neglect. *Say. Rep.* 50, 172. or to the opposite party, for *vexatious* and improper conduct. 2 Burr. 654.

Attornies to attend the first appointment. *It is ordered*, from and after the *first* day of next *Easter* term, on every appointment to be made by the master, the party on whom the same shall be served and required to attend, shall attend such appointment, *without waiting for a second*; or in default thereof, the master shall proceed *ex parte* on the *first* appointment. *Rule, Hil. 32 Geo. 3.*

To be governed by the master. They are to be governed by the master, and to attend him on notice; *R. Hil. 15 Car. 2.* May file bills and declarations, paying two shillings a term, and examine the files *gratis*. *Mich. 15 Car. 2. reg. 3.*

In all disputes respecting masters and clerks, court to exercise a jurisdiction. In all disputes concerning attornies' clerks, and their articles, or money given with them, the court exercise an equitable jurisdiction, upon motion, and appoint a restitution on the death of the master, or clerk, of part of the money given, according to the time actually served. 2 Keb. 38.

As to giving Evidence.

Not bound to discover contents of a deed. An attorney is not bound to discover and give in evidence the contents of a deed shewn by his client, nor any instructions given him by his client, nor can he be forced to act against his will.

Attorney when restrained from giving evidence or not; He is not restrained from giving evidence of a conversation between him and his client, touching the justice of his suit, after inquiry executed, or judgment by default, and a *compromise thereupon*. *Cobden v. Ken-*

drick, 4 Term Rep. 431. The difference is, whether when may be the communication were made by the client to his attorney in confidence, as instructions for conducting his cause, or a mere *gratis dictum*. The privilege is confined to the cases of counsel, solicitor, and attorney; but in order to raise the privilege, it must be proved, that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a steward, he may be examined. *Per Buller*, J. 4 Term Rep. 759. *Wilson v Rastall*.

An attorney employed by consent of two parties, in preparing a deed from one to the other, cannot be examined as to what he became so informed of in preparing the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed. *Robson and an. ass. of Blakey v. Kemp*, Esp. N. P. 235. If concerned for both parties, not to be examined as to what he was informed in preparing deed.

But he is not privileged from giving evidence of collateral facts. *Cowp. Rep.* 846. *Doe v. Andrews*. He is bound to disclose, when called upon as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client, his privilege only extending to confidential communications from his client, and not to communications from collateral quarters, although made to him in consequence of his character of attorney. 7 East. 358. If he attests any instrument, he is bound to prove its execution. He is obliged to prove his client's having sworn and signed an answer, upon which the latter is indicted for perjury. *Ibid. Bull.* 284. For that is not communicated to him be his client professionally, but a fact which he might know of his own knowledge. *Contra*, 2 Str. 1122. *Rex v. Watkinson*. When not privileged from examination.

A solicitor to a third person is bound to produce his client's lease executed by the defendant, provided the production will not operate to the prejudice of his client. — But if the reading of such document will operate to the prejudice of a third person, the court will not direct it to be read. *Copeland v. Watts and another, executors of Gubbins*, 1 Stark. N. P. Rep. 95. When attorney is bound to produce his client's deed.

As to Payment to an Agent in the Country.

Action on a note. The plaintiff's attorney in town, had sent the note to Fox, an attorney at Coventry, where Payment of the debt to an agent in the

country, employed by an attorney in town, under circumstances is not payment to the plaintiff, though payment to the attorney himself is.

defendant resided, to present it for payment; and by the letter enclosing it, directed him, if payment should be refused, to return it immediately to him; adding, that in that event he would send down a writ to him, to arrest the defendant. Payment was refused to *Fox*, of the note, who wrote to the attorney in town, to inform him of it, and a writ was sent to him; he was arrested, and bail to the sheriff. *Fox* afterwards got an assignment of the bail-bond, and sometime after the defendant paid the debt and all the costs to *Fox*, who gave him a receipt. After this the bail were served with process and declarations, *Fox* not having paid the money over to plaintiff, or his attorney, and the attorney in town having employed another agent, but without having given any notice of the change to the defendant. The letter to *Fox*, accompanying the note, had not been shewn to the defendant, before he paid the money; but when the process had been served by the new agent, *Fox* produced it to the defendant, to convince him that he was duly authorized to receive the money. Rule for plaintiff to shew cause why the proceedings on the bail-bond, subsequent to the payment of the debt and costs by defendant, should not be set aside with costs; and all further proceedings be staid, and *Fox* ordered to answer the matters in the affidavit. The court were clear, that an agent employed to sue, is not therefore authorized to receive payment. That the letter, so far from importing an authority to receive the money, implied the reverse; in case the note should not be paid voluntarily, because, in that event, *Fox* was to return it. If it had been meant, that he should also in that case receive the money, the note would have been left in his custody. *Fox* having made no exculpatory affidavit, an absolute rule was made, that upon payment by the defendant of the debt and costs (the costs of the application excepted) to the plaintiff, all further proceedings should be staid, and that *Fox* should pay the debt and costs to the defendant, and plaintiff's costs of the application, before 1st March, otherwise an attachment to issue against him. *Yates v. Freckleton*, *Dougl. Rep.* 622.

Fox, in this case, ought to have been struck off the roll. See the *stat.* 3 *Jac.* 1. c. 7. and *Rule, M.* 1654. *sect.* 4. The courts, in these cases, with great submission, are too lenient. *Integrity*, in my opinion, the courts ought to look to, as well as *care* and *skill*.

Agent in town.

But if the agent in town, take money out of court,

which the defendant has paid in under a judge's order, but irregularly, that shall *bind the plaintiff*, and be a waiver of the irregularity. *Griffiths v. Williams*, 1 Term Rep. 710. Payment to the attorney, is payment to the principal. 1 *Black. Rep.* 8. *Powell v. Little*.

Affidavits, &c. before Admission.

In the King's Bench.

A. B. of—, &c. gentleman, maketh oath, and saith, that by articles of agreement, bearing date the day of last past, and made between C. D. of gentleman, one of the attornies of his majesty's court of *King's Bench* at *Westminster*, and a solicitor in the high court of *Chancery*, of the one part, and G. W. of &c. and R. W. son of the said G. W. of the other part, the said R. W. for the consideration therein mentioned, did put, place, and bind himself clerk to the said C. D. to serve him in the profession of an attorney at law, and solicitor in *Chancery*, from the day of the date of the said articles, for the term of five years from thence next ensuing, and fully to be complete and ended: and which said articles were, in due form of law, executed by the said C. D. R. W. and G. W. in the presence of this deponent, and J. K. of , and that the names G. H. and J. K. set and subscribed as witnesses to the due execution thereof, are of the proper hand writing of this deponent, and the said J. K.

Affidavit of the due execution of articles of clerkship.

To be engrossed on a 2s. 6d. stamp paper.

A. B.

Sworn, &c. (a)

Notice is hereby given, that R. W. of now under articles of clerkship to C. D. of attorney at law, intends to apply next term to be admitted or readmitted an attorney of his Majesty's court of King's Bench. Dated this day of 81

The notice of intention to apply for admission.

In the King's Bench.

R. W. of, &c. gentleman, maketh oath, and saith, that he hath strictly served, and been employed by C. D. of Gent. as his clerk, in the practice of an attorney, and solicitor, for the full term of five years, pursuant to the articles hereunto annexed; and this deponent further saith, that he did, *previous* to

Affidavit of service under articles, and notice of intention to apply for admission.

(a) To be sworn before a judge in town; if in the country, before a commissioner of this court: and to be filed with the master in the King's Bench office, who registers the articles at the same time.

Before whom to be sworn, and with whom to be filed.

last term, affix the name and place of abode of him, this deponent, and also the name and place of abode of the said C. D. in the King's Bench office, and on the outside of the court of King's Bench, at Westminster-hall; and that he did, also, previous to the same term, enter his name of place of abode, as well as the place and abode of the said C. D. in the book kept for that purpose at the chambers of each of the judges of his majesty's court of King's Bench.

Sworn, &c.

R. W.

In the King's Bench.

The like of the payment of stamp duty on articles.

R. W. of, &c. gentleman, maketh oath, and saith, that the duty of 120l. imposed on articles of clerkship, by an act of parliament lately made and passed, was paid on certain articles of clerkship, made between C. D. of gentleman, one, &c. of the one part, and G. W. of and this deponent R. W. son of the said G. W. of the other part bearing date the day of 18, as appears by the stamp affixed on the said articles. And this deponent further saith, that the said articles were executed on the day of the date thereof, and were duly registered on the day of 18, as appears by the certificate of thereon.

Sworn, &c.

R. W.

CIRCUIT.

The court of assize.

THE court of *assize* and *nisi prius*, are composed of two or more commissioners, who are, *twice* in every year, sent by the king's special commission, all round the kingdom (except *London* and *Middlesex*) where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts, and except the four northern counties, (where the *assizes* are taken only once a year) to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of *Westminster-hall*. They came into use in the room of the ancient justices in eyre, who made their circuit once in seven years, for the purpose of trying causes. *Co. Litt.* 293. *See Mag. Chart.* 12.

The present justices of *assize*, and *nisi prius*, are derived from the statute of *Westm.* 2. 13 *Ed.* 1. c. 30. 14 *Ed.* 3. c. 16. and must be two of the king's justices, of the one bench or the other; or the chief baron of the Exchequer, or the king's serjeants sworn; they usually

make their circuit in the respective vacations of *Hilary* and *Trinity* terms. 3 *Ed.* 1. c. 51.

The judges sit by virtue of five several authorities. Judges authority.

1. *The commission of the peace.*
2. *A commission of oyer and terminer.*
3. *A commission of general gaol delivery.*
4. *A commission of assize*, directed to the judges and clerk of assize, to take the assizes: that is, to take the verdict of a peculiar species of jury called an assize; and summoned for the trial of landed disputes.
5. That of *nisi prius*, which is a consequence of the commission of assize being annexed to the office of those justices by the *stat. of West.* 2. 13 *Ed.* 1. c. 30. and it empowers them to try all questions of fact issuing out of the courts at *Westminster*, that are then ripe for trial by jury. The Trial at nisi prius.

The origin of the name is this: all causes commenced in the courts of *Westminster-hall* are by the course of the courts appointed to be there tried, on a day fixed in some *Easter* or *Michaelmas* term, by a jury returned from the county wherein the cause of action arises: but with this proviso, *nisi prius iusticiarii ad assisas capiendas venerint*: unless before the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding *Easter* and *Michaelmas* term, and there dispose of the cause; which saves much expence and trouble both to the parties, the jury, and the witnesses.

The several counties in *England* are divided into six The several circuits, viz. circuits.

The *Midland*, containing the counties of

Northampton,
Rutland,
Lincoln,
Nottingham,

Derby,
Leicester,
Warwick.

Norfolk.

Bucks,
Bedford,
Huntingdon,

Cambridge,
Norfolk,
Suffolk.

Home.

Hertford,
Essex,
Kent,

Sussex.
Surrey.

CIRCUIT.

Oxford.

*Berks,
Oxford,
Hereford,
Salop,*

*Gloucester,
Monmouth,
Stafford,
Worcester.*

Western.

*Southampton,
Wilts,
Dorset,*

*Cornwall,
Devon,
Somerset.*

Northern.

*York,
Durham,
Northumberland,*

*Cumberland,
Westmorland,
Lancashire.*

The assizes are held for *Durham*, *Northumberland*, *Cumberland*, and *Westmorland*, once in the year only, viz. in the *summer*; but they are held for *York* and *Lancaster*, twice in the year. For *Bristol* once in the year, viz. in the *summer*.

Officers.

The officers appointed for each circuit are, "the clerk of assize, the associate, clerk of arraigns, clerk of indictments, the judge's marshal, cryer, clerk," and *tipstaff*.

Sheriff.

The sheriff of each county, and his deputy, are to attend the *judges*; and the coroner also attends to deliver in all inquisitions, &c. to the clerk of assize in court, and he is to return all writs of *venire*, *distringas* and *habeas corpora*, where the *sheriff* is a party in the suit; which writs are specially directed to him for that purpose.

Of the Terms.

Terms.

THE *Terms*, are those spaces of time, wherein the courts of justice are open, for all that complain of wrongs, or injuries, and seek their rights by course of law or action, in order to their redress, and during which the courts of *Westminster-hall* sit and give judgments, hear complaints, &c.

When instituted.

These *Terms* are supposed by *Selden*, to have been instituted by *William the Conqueror*; but *Spelman* hath shewn that they were gradually formed from the canonical constitutions of the church; being no other than those leisure seasons of the year, which were not occupied by the greatest festivals or fasts; or which were not liable to the general avocations of rural business.

There are in each of these terms stated days, called *51 H. 3. st. 3.*
days in bank, dies in banco, that is, days of appearance in *32 H. 8. c. 21.*
 the court of Common Pleas, called usually *bancum*, or *1 Inst. 134.*
commune bancum, to distinguish it from *bancum regis*,
 which are generally at the distance of a week from each
 other, and regulated by some festival of the church: on
 some one of these days in bank, all *original writs* must be
 made returnable; and therefore they are generally called
 the returns of that term; whereof every term has more
 or less, said by the *Mirror*, c. 5. sec. 108. to have been
 originally fixed by king *Alfred*, but certainly settled as
 early as the stat. of *51 Hen. 3. st. 2.* *3 Black. Com. 277.*
 But though many of the return days are fixed upon *Sun-*
days, yet the court never sits to receive these returns till
 the *Monday* after; and therefore no proceedings can be
 had, or judgment given on the *Sunday*. *Salk. 627.*
6 Mod. 250. 1 Jon. 156. 2 Lill. Abr. 569. 3 Burr. 1596.
W. Black. Rep. 496, 526.

The first return in every term is, properly speaking, *First return of*
 the *first day* in that term; as, for instance, the *octave of* *the term.*
St. Hilary, or the eighth day inclusive after the feast of
 that saint; which falling on the thirteenth of *January*,
 the *octave* therefore, on the first day of *Hilary term*, is the
 twentieth of *January*: and thereon the court sits to
 take *essoigns*, or excuses, for such as do not appear ac-
 cording to the summons of the writ; wherefore this is
 usually called the *essoign day* of the term. But the per-
 son summoned has *three days of grace*, beyond the return
 of the writ, in which to make his *appearance*: and if he
 appears on the *fourth day inclusive*, it is sufficient. *2 Lill,*
Abr. 569. 1 Inst. 135.

The term regularly is esteemed as *one day*, *4 Co. 71. a.* Regularly one
 and the *first day* is the *essoign day*, for the *quarto die post* day.
 is a day of grace. *1 Bul. 35. Walter's case.* Judgment
 relates to the *first day*, though a day be assigned for argu-
 ment at a day subsequent. *1 Bul. 69.*

The *quarto die post* is the *full term*, and the day for *Quarto die*
 appearance of the parties. *1 Bul. 35.* There shall be no *post.*
 judgment against defendant upon his *default*, till the
quarto die post. *Ibid.*

It is said, judgments relate to the *essoign day* if pro-
 ceeding be *by original*; if *by bill*, to the *quarto die post*,
2 Saund. 148. f. 2. T. R. 576,

In *Belk v. Broadbent*, Lord *Kenyon* said, no doubt but
 that in the eye of the law the *essoign day* is for many pur-

poses the *first* day of the term; the *quarto die post* is only an indulgence. And *Buller, J.* said, though the courts do not actually sit on the *essoign day*, yet in *law* it is considered as the *first* day of the term. 3 *Term Rep.* 185.

Two judgments signed same day.

Where two judgments are signed on the same day, the priority of one cannot be averred. *Ld. Porchester v. Petre*, 1 *Term Rep.* 118.

RETURNS OF WHITS.

Michaelmas term, which contains three weeks and two days, hath four returns.

By Original.

1. *On the morrow of All Souls.*
2. *On the morrow of Saint Martin.*
3. *In eight days of Saint Martin.*
4. *In fifteen days of Saint Martin.*

By Bill and Attachment of Privilege.

1. *On next after the morrow of All Souls.*
2. *On next after the morrow of Saint Martin.*
3. *On next after eight days of Saint Martin.*
4. *On next after fifteen days of Saint Martin.*

Hilary term, which contains three weeks, hath four returns.

By Original.

1. *In eight days of Saint Hilary.*
2. *In fifteen days of Saint Hilary.*
3. *On the morrow of the Purification.*
4. *In eight days of the Purification.*

By Bill and Attachment of Privilege.

1. *On next after eight days of Saint Hilary.*
2. *On next after fifteen days of Saint Hilary.*
3. *On next after the morrow of the Purification.*
4. *On next after eight days of the Purification.*

Easter term, which contains three weeks and six days, hath five returns.

By Original.

1. *In fifteen days of Easter.*
2. *In three weeks after Easter.*
3. *In one month after Easter.*
4. *In five weeks from Easter-day.*
5. *On the morrow of the Ascension.*

By Bill and Attachment of Privilege.

1. *On next after fifteen days of Easter.*
2. *On next after three weeks from the day of Easter.*
3. *On next after one month from the day of Easter.*
4. *On next after five weeks from the day of Easter.*
5. *On next after the morrow of the Ascension.*

Trinity term, which contains twenty days, hath four returns.

By Original.

1. *On the morrow of the holy Trinity.*
2. *In eight days of the holy Trinity.*
3. *In fifteen days of the holy Trinity.*
4. *In three weeks of the holy Trinity.*

By Bill and Attachment of Privilege.

1. *On next after the morrow of the holy Trinity.*
2. *On next after eight days of the holy Trinity.*
3. *On next after fifteen days of the holy Trinity.*
4. *On next after three weeks of the holy Trinity.*

Every day in the term, (except *Sundays*, or days on which the court do not sit) is a good return by bill: the court do not sit on *the feast of the Purification, Ascension-day, and Midsummer-day*, unless it happens on *Friday* next after *Trinity Sunday*; then it is good by *stat. 32 H. 8. c. 21.*

OBSERVATIONS ON THE TERMS.

HILARY term begins *January 23*, (except it happens on *When Hilary Sunday*,) then on the *Monday* following, and ends term begins *February* the 12th, if not *Sunday*, then on the *Monday* following.

Easter Term, begins *Wednesday* fortnight after *Easter* *Easter term*. day, and ends on *Monday* before *Whitsunday*.

Trinity Term, begins on the *Friday* after *Trinity Sun-* Trin. term. day, that day being appointed by the *32 H. 8. c. 21.* and ends the *Wednesday* fortnight after, unless it happens to be on the 24th of *June*, the feast of *St. John the Baptist*, which is no court day: then it must be adjourned to the next day. See *Cro. Jac. p. 16. 2 Bulstrode, 242.*

Michaelmas Term, begins *November* the 6th, (except it *Michaelmas* happens on a *Sunday*,) then on the *Monday* after, and term. ends *November* 28th, (except it be on *Sunday*,) then the 29th. *Stat. 24 Geo. 2. c. 48.*

The issuable terms are *Hilary* and *Trinity*.

There are no sittings in *Westminster-hall* on *Ascension-* When no sit- day, *Midsummer-day*, and the second day of *February*, tings. being the *Purification*.

The *Exchequer* opens eight days before any term, (ex- Appearance cept *Trinity*,) before which it opens but four days, days.

The first and last days of every term are the days of appearance.

Trin. 35 Geo. 3. 1796. Whereas the present *Trinity* Trinity term enlarged a

day, the last
day being
Mids. day.

Term will not end until *Thursday*, the 25th *June* instant, *It is ordered*, That the sittings for trials of causes at *nisi prius*, do commence in *Middlesex* on *Friday* the 26th instant; and in *London* on *Saturday* the 27th instant: instead of the days already appointed. And that writs issued out of this court, may be made returnable on *Thursday* next after three weeks of the *Holy Trinity*. The fact was, that *Midsummer-day* happened 24th *June*, 179. on a *Wednesday*, and the last day of that term.

The same thing happened in 1556. *Br. Adj.* 35. The like happened in *C. J. Holt's* time, *Farr.* 117.; who said *Trinity* term may begin, but cannot end on *Midsummer-day*.

OBSERVATIONS ON THE RETURNS OF WRITS.

What days
are to be
avoided in the
return of the
writ.

ALL *non-judicial* days must be avoided, on which no writ can be made returnable, such as the *feast of the Purification*, in *Hilary* term; *Ascension-day*, in *Easter* term; and *Midsummer day*, in *Trinity* term, if it so happen (unless it happens on *Friday* next after *Trinity Sunday*, for then it is *dies juridicus*, by stat. 32 H. 8. c. 21.) and writs returnable on any of these days are *not* good. 2 *Inst.* 264. Sunday is *dies non juridicus*. 5 *Mod.* 262.

If a writ be returnable on a *dies non juridicus*, it is void. 6 *Mod.* 148, 196.

11th Nov.

The eleventh day of *November*, being the feast of *St. Martin*, in *Michaelmas* term, cannot be said to be in or upon any return: and if a writ be returnable on that day, it must be returnable on *Thursday*, the feast of *St. Martin*, or any other day in the week it falls on, and if returnable the day after, *Friday*, the morrow of *St. Martin*.

Return of
writs by bill.

In this court every bill of *Middlesex*, *latitat*, *alias capias*, *pluries capias*, *distringas*, and *habeas corpus ad satisfaciend.* must be returnable on a day certain, as on *Monday* next after, &c. and may be returnable after the first day in full term, as the 6th of *November*, on an *essoign*, or general return day in term time; but then the day of the week must be expressed, as on *Friday* in one month, &c. But this is seldom used, unless in order to get some advantage in that term. If the *essoign day* happens on a *Sunday*, writs by bill must be made returnable on the first day of the term, being the day on which the court sit.

The award of any judicial writ on a *Sunday* is void *Sir W. Jones*. The court must take judicial notice of the commencement and return of the term. For the calendar is part of the law of the land. 6 *Mod.* 250.

Award of process on Sunday, void. Almanack.

Restoration day, 29th May, 1767. Only one judge came down. It is not usual that any business is done upon this anniversary. But this being the *last common paper day*, one judge went through the paper; otherwise the parties could not have had their judgments within this term. *E. T.* 7 *Geo.* 3. 4 *Burr.* 2089.

K. Ch. restor. day.

All writs of *capias*, *alias*, and *pluries*, grounded on an original out of Chancery; and all writs subsequent thereto, to the outlawry, writs of *scire facias quare executionem et audiendum errores*, upon writs of error out of the Common Pleas, or other inferior courts, writs of *capias ad satisfaciendum*, *fieri facias*, and other judicial writs after judgment affirmed, *retorno habendo*, *capias in withernam*, and all other writs and process, grounded upon any *recordari facias loquelam*, *audita querela*, *accedas ad curiam*, *capias si laicus*, and every other judicial writ of Chancery, must not be made returnable on a day certain, but on a *general return* or *essoign day*, *ubique*, as from the day of Easter in fifteen days, *wheresoever we shall then be in England*.

Writs grounded on an original.

In all original writs, there should be at least *fifteen days between the teste and return*. 2 *Inst.* 567. So of the *alias* and *pluries*, though if there be less it will be aided by appearance and pleading in chief. 1 *Ld. Ray.* 671. (a)

Original writs have 15 days between the teste and return.

The court of Common Pleas amend all *mesne* process in the teste, and also an attachment of privilege, as no error can be assigned in *mesne* process. 3 *Wils.* 454.

In all actions of debt, and all other personal actions by ejectment, brought by original, there need not be *fifteen days between the teste and return* of any writ or writs of *venire facias*, *habeas corpora juratorum*, or *distringas juratores*, *fieri facias*, and *capias ad satisfaciendum*; and the want thereof shall not be assigned for error; but this not to extend to any writ of *ca. sa.*

When there need not be 15 days between the teste and return.

(a) By stat. 16 *Car.* 1. c. 16. s. 7. The morrow of the Ascension is a good return, although there be not fifteen days between the fourth day of the said return, and the *essoign day* of the morrow of the Holy Trinity.

Exception.

wherein any *exigent* after judgment is to be awarded, or to a *capias ad satisfaciend.* against the defendant, to make the *bail liable*; these writs are to have fifteen days between the teste and return. *Stat. 13 Car. 2. c. 2. sect. 6, 7.*

RULES NECESSARY FOR PRACTISERS.

GENERAL rules are wisely established for attaining justice with ease, certainty, and dispatch. But the great end of them being to *do justice*, the court are to see that it be really attained. 1 *Burr.* 301.

The practice of the court, forms the law of the court: The plaintiff and defendant are both bound to take notice of the *general rules of practice* in this court; but if there be a *special particular rule* of court made for the plaintiff, or for the defendant, he for whom the rule is made, ought to give notice of this rule unto the other, or else he is not bound generally to take notice of it, nor shall be in contempt of the court, although he do not obey it: for *general rules* are the practice of the court, whereof every one must take notice, that hath to do there; but *particular rules* are made upon particular and extraordinary matters happening in the proceedings, upon the motion of one of the parties made to the court; of which the other may be ignorant, and therefore is to have notice of them given unto him.

Addition.

In an affidavit to hold to bail, the plaintiff must give himself an *addition*; otherwise the defendant will be discharged on common bail. 1 *East. Rep.* 18. *Jarrett v. Dillon*, also 330. And any irregularity must be immediately taken advantage of in the first instance, for if the defendant put in bail it is waived. *Dargent v. Vivant*, 1 *East. Rep.* 330. See *Jones v. Price*, *ibid.* 81.

Any irregularity must be immediately taken advantage of.

Affidavit to hold to bail need not be intituled.

6 Term Rep. 640.

Criminal information not to be read.

Contra on shewing cause.

By rule of court, *Trin. T. 37 Geo. 3.* it is ordered that affidavits of any cause of action before process sued out, to hold a defendant to bail, *be not intituled in any cause, nor read if filed*, nor need it be intituled in the *King's Bench*. 7 *Term Rep.* 454. This rule is now recognised by the C. P. *Green v. Redshaw*, 1 *Bos. and Pul.* 227.

If an affidavit on a motion for leave to file a *criminal information*, be intituled, it cannot be read. *Rex v. Robinson*, cited in 6 *Term Rep.* 642.

But an affidavit produced on *shewing cause* against such rule, may, or may not be intituled. *Ibid.*

Affidavits (and motions) for an attachment in a civil suit, are proceedings on the civil side of the court until the attachment issues, and must be intituled with the names of the parties; and so must affidavits made in answer to rules nisi for attachments. *Whitehead and others v. Firth*, 12 East. 165. But as soon as the attachment issues, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. *Wood v. Webb*, 3 Term Rep. 253.

Affidavits to set aside an attachment that has been granted (though not issued) in the course of a civil suit, must be intituled, as "*The King v. the party to be attached.*" *Rex v. the Sheriff of Middlesex.* 7 Term Rep. 439, 527.

The christian names, as well as the surnames, of the parties must be inserted in the title of an affidavit produced to shew cause against any rule. *Fores v. Diemar*, 7 Term Rep. 681.

Where the affidavit was filed without any title, this court refused to take any notice of it, though the adverse party was willing to waive the objection. *Owen v. Hurd*, 2 Term Rep. 644.

An affidavit to support a rule nisi for staying proceedings on a bail-bond, should be intituled in the action against the bail. *Roberts v. Giddins*, 1 B. and P. 337. So in this court.

The court must be named in the affidavit to set aside any proceedings, as, "in the King's Bench." See *Green v. Redshaw*, 1 Bos. and Pull. 227.

The court will in no case issue an attachment against a party at the suit of another, where the affidavits, on which the motion is founded, are sworn before the agents of the prosecutor. *Rex v. Wallace*, 3 Term Rep. 403.

An affidavit may be taken before the clerk of the attorney in the cause, if the clerk be empowered to take affidavits at all. *Goodtitle dem. Pye v. Badtittle*, 8 Term Rep. 638.

The court will take cognizance of affidavits sworn before foreign magistrates, if properly authenticated by them. *Dalmer v. Barnard*, 7 Term Rep. 351.

It is no objection to an affidavit to hold to bail that it is not intituled "in the King's Bench," or that it appears to have been taken before "A. B. a commissioner, &c." without adding "*of the court of K. B.*" if in fact he were K. B.

a commissioner of that court. *Kennet and Avon Canal Comp. v. Jones*, 7 Term Rep. 455.

Place to be mentioned in the jurat, where sworn. It is necessary in all affidavits sworn, that the place should be mentioned in the *jurat* of the affidavit where sworn. See 1 *Bos. and Pull.* 105, or it will be disallowed.

Several join, all the names must be written in jurat. Where several persons join in an affidavit, their names must be written in the jurat; and no affidavit can be read if there be any interlineation or erasure in the jurat. *E. M.* 37 Geo. 3. 7 Term Rep. 82.

Affidavit to hold to bail. It is not sufficient for the plaintiff to swear *positively* to a debt to hold to bail, without shewing also the *nature of that debt*. *Jacks v. Pemberton*, 5 Term Rep. 512.

No supplemental affidavit. If an affidavit to hold to bail be defective, *this court* will not permit the plaintiff to file a *supplemental one*. *Ibid.* Dougl. 467. *Cope v. Cooke*, 5 Term Rep. 552. S. P. (a)

Illiterate persons swearing affidavits. If an affidavit be made by any person before a commissioner, who from his or her *signature* appears to be *illiterate*, he shall certify or state in the jurat, *that it was read in his presence, and that he seemed perfectly to understand the same*, and that the party wrote his or her name in the presence of the commissioner taking the affidavit. *R. E.* 31 Geo. 3.

Affidavit to ground a motion. But to ground a motion in a cause in court, the affidavit must be intituled, *in the King's Bench*, also, with names of the plaintiff and defendant; otherwise it is a good objection; and a rule obtained on it will be discharged. *E. T.* 31 Geo. 3. 31 May, Lord Kenyon gave notice of this in court, and said, that attornies ought to be careful in this respect, for he thought them answerable to their clients for the consequences; and the master certified this to be the constant course of the court. *Owen v. Hurd*, 2 Term Rep. 644.

Crim. infor. But it is the practice of the court to receive affidavits against any rule for a criminal information, without any title in the cause, until the rule is made absolute. *Rex v. Harrison*, 6 Term Rep. 60.

(a) The most trifling inaccuracy, even the mistake of a letter renders an affidavit defective. 2 *Wills.* 225. and it must be *positive, not argumentative*. 5 Term Rep. 314.

Affidavits made for an attachment, for not performing an award, (there being no action depending,) need not be intituled, but the affidavits in answer must. *Bevan v. Bevan*, 3 Term Rep. 601. Attachment for not obeying award.

Bail above may be put in on a *dies non juridicus*. *Baddely v. Adams*, 5 Term Rep. 170. Bail above on a dies non, good.

If the plaintiff holds two defendants to bail on a joint writ, and declare against them separately, the court will set aside the proceedings. *Moss v. Birch*, 5 Term Rep. 722. Two defendants cannot be held to bail in a joint action.

If the declaration be taken out of the office, it cures a defect in the process. *Caswall v. Martin*, 2 Str. 1072. Decl. taken out cures defect in process.

The plaintiff cannot deliver a declaration *de bene esse*, after the time for the defendant's appearance is expired. *Baker v. Cooper*, 6 Term Rep. 548.

An error in *mesne process*, is cured by appearance, 1 Str. 155. because the only intent of mesne process is to bring the defendant into court. *Lucas* 86. *Widrington v. Charlton*, Cas. temp. Hard. 39. Error in mesne process is cured.

If the defendant be served by a wrong name, and he appears by his right one, it is cured, if the plaintiff declare against him by his right name. *Doe v. Butcher*, 3 Term Rep. 611. But if the defendant does not enter his appearance, it is not in the power of the plaintiff to set it right by filing appearance in his right name. *Ibid*. *Dring v. Dickinson*, 11 East. 225. But can never be cured by plaintiff's entering appearance.

If two actions be brought by the same plaintiff, at the same time, for causes which may be joined in one action, and the defendant is holden to bail in both, the court will compel the plaintiff to consolidate them, and to pay the costs of the application. 2 Term Rep. 639. *Cecil v. Briggess*. If two actions be brought for causes which may be joined, plaintiff must consolidate.

The plaintiff cannot in any case declare by the bye, before he has declared in chief. *Delves, q. t. v. Strange*, 6 Term Rep. 158. 7 Term Rep. 80. Declaration by the bye.

Bail are not regularly put in, unless the name of the proper county be inserted in the bail-piece. *Smith v. Miller*, 7 Term Rep. 96. County to be inserted in the bail-piece.

No exception against bail is avoidable until the plaintiff give notice of the exception. *Oldham v. Burrell*, 7 Term Rep. 26. No exception to bail without a notice.

All irregularities in the process, or declaration, should be complained of before interlocutory judgment; for Irregularities to be complained of in

the first instance.

whenever the proceedings are irregular, the court will, if the application be made in the first instance, set them aside; but if the defendant lies by, and suffers the plaintiff to proceed, the court will not assist him. *3 Term Rep.* 7. 10. Delay is an answer to any objection of irregularity, *per Buller, J.* and the party who applies for a favor must ~~come to the court~~ in the first instance.

Distinction between a mere irregularity and defect in the proceeding.

There is a distinction between a mere irregularity in the mode or time of proceeding, and a defect in the proceedings themselves. Therefore if an affidavit be, that the maker and indorser of a note are *severally* indebted to the holder on *one* stamp only, *including both in the writ*, with several *ac-etiams*, neither can be held to bail; and if either be, *and the bond be assigned*, though one put in bail only, yet he may move to set same aside for the defect. *Hussey v. Wilson*, *5 Term Rep.* 254. The appearance in this case does not cure it.

If there be an irregularity, it must be shewn.

Where an *irregularity* is complained of, the party complaining must *shew the irregularity*; and not put it upon the other party to vindicate his proceedings, and shew that he is regular. *Rex v. Perry*, *5 Term Rep.* 464.

On stat. 27 Geo. 3. c. 1. an affidavit must be filed though the writ be not bailable.

If no affidavit of debt, specifying the penalties, be made and filed previous to the issuing the writ under the *stat. 27 Geo. 3. c. 1.* though the defendant take the declaration out of the office, yet he may move to quash the writ, and stay the subsequent proceedings; although plaintiff did not in such writ hold him to bail, nor specify in it the penalties which are directed by the act. *King qui tam v. Horn*, *4 Term Rep.* 349.

An action on a penal statute is not to be commenced in a mode prohibited by the act.

Where several persons have *separately* incurred penalties for printing illegal schemes of the lottery, a *separate* affidavit must be made and filed against each of them, and if they be *all* joined in *one* affidavit, the irregularity is not waived *by putting in bail*, but the court will quash the writ on motion. The plaintiff would have agreed to accept *common bail*, but the court said, we are to take care that an action on a *penal* statute, shall not be commenced in a mode prohibited by the statute. *Goodwin qui tam v. Parry*, *4 Term Rep.* 578.

Irregularity in process a copy to be annexed.

If the defendant complains of *irregularity in process* or *notice*, he must annex *the copy* to his affidavit, that it may appear to the court.

If prisoner do not take the

If a prisoner be *supersedeable* for any *irregularity*, as for want of a *demand of plea*, he cannot take advantage

of it, *after he is charged in execution.* *Rose v. Christfield*, 1 Term Rep. 591. first advantage.

If the defendant swear that the debt for which the action is brought is under 40s. he may move to stay the proceedings, which the court will order, if plaintiff does not deny it. *Wellington v. Arters*, 5 Term Rep. 64. If debt be under 40s.

If a rule to return the writ be taken out in the vacation, although it be dated the first day of the next term, and an attachment be granted for not obeying it, the court will set aside the attachment. For such a rule is false in itself, irregular and improper. *Rex v. Sheriff of Cornwall*, 1 Term Rep. 552. This rule was taken out *before* the commencement of *Mich.* term, and intituled the *first* day of that term. Rule taken out in vacation, and dated the first day of the next term, held irregular.

A sheriff cannot be ruled to bring in the body, until the *day after* the expiration of the rule to return the writ, *Hodgson v. Nugent*, 5 Term Rep. 277. *Rex v. Sheriff of Middlesex*, 8 East. 525. Rule to bring in the body.

The four days allowed for pleading in abatement are *both inclusive.* *Jennings v. Webb*, 1 Term Rep. 277. If the last of the four days happen on a *Sunday*, then defendant has *all Monday.* *S. P.* 5 Term Rep. 210. Pleading in abatement.

A rule to plead is necessary to compel a plea, in bar; but it may be dispensed with by pleading either in bar, or abatement. *Brandon v. Payne*, 1 Term Rep. 690. But where no time has been given by a judge's order, a rule to plead may be dispensed with. Rule to plead, when dispensed with.

When the law requires that a month's notice of an action be given, *the month* begins with the day on which the notice is served. 3 Term Rep. 623. If the law requires a month's notice.

When the word *month* is used in a statute, without the addition of *calendar*, or any other words to *show* that the legislature intended *calendar*, it is understood to mean a lunar month. 6 Term Rep. 224. When month is used in a statute.

A month's time to plead means a *lunar* month, or *four weeks*, 3 Burr. 1455. And so in all legal proceedings a *month* means *four weeks.* *Ibid.* *Tullet v. Linfield.* A month's time means a lunar month.

On a *quare impedit*, six months are understood six calendar months. *Ibid.* 13 Ed. 1. c. 5. Quare impedit.

There is a distinction between the *temporal* and the *ecclesiastical* law, in interpreting this term, "*month*;" the former understands it to be *lunar*, the latter to be *calendar*; per *Denison, J.* Eccl. and temp. courts, distinction.

Attorney four days to plead. An attorney of this court is only entitled to *four days time to plead*, though he reside *more than twenty miles distant from London*. *Man v. Fletcher*, 5 Term Rep. 369. *Contra* in the other courts.

This is a great hardship on the attorneys who live at great distances: the Common Pleas give eight days above 20 miles from *London*.

Demand of plea. The demand of a plea may be given *after* the rule to plead entered, and on the *same* day declaration is delivered, or rule given. And in cases where defendant puts in bail, or enters his appearance in due time, *Nott v. Oldfield*, 1 Wils. 134, must be delivered *twenty-four hours* before judgment can be signed. *Dyche v. Burgoyne*, 1 Term Rep. 454.

Judgment for want of plea. Judgment may be signed for want of a plea on the 5th day in the afternoon; provided a rule to plead has been duly given, and demand of plea made *twenty-four hours previous* (if such demand was requisite.)

Plea may be filed before judgment. If the plaintiff delay signing judgment, a plea may be filed or delivered, although the rule is expired. 1 Term Rep. 17. *Minus v. Baxter*.

When new rule to plead. If a declaration be delivered in *Michaelmas* term, and rule to plead given; if the plaintiff does not sign judgment in *Michaelmas* term, and *Hilary* term is commenced, a *new rule to plead again is necessary*, to warrant the judgment of *Hilary* term.

When need of none. If time to plead be given in vacation to the first day of the next term, no rule is necessary to warrant the judgment.

Rule given to be after filing or delivery of declaration. The rule to plead ought not to be given, until the *declaration be actually filed or delivered*; and must be so given in *term*, or within *four days after*.

When demand of plea not necessary. There are three cases in which a *demand* of a plea is *not necessary*: 1. *Where the plaintiff files common bail according to the statute*. 2. *Where the defendant is in custody of the sheriff*. 3. *If defendant does not file bail, or enter his appearance*. *Rose v. Christfield*, 1 Term Rep. 591. 636. *Coke v. Raven*.

Twenty-four hours exclusive of Sunday. If a plea be demanded on *Saturday*, the defendant has *twenty-four hours* to plead *exclusive of Sunday*. *Solomons v. Freeman*, 4 Term Rep. 557.

When demand of plea, waiver The demand of a plea is a waiver of bail, if no bail at

that time put in; but if the bail be put in, it is a waiver of the justification only. of bail, or justification.

Where the plaintiff, after giving a rule to plead, is delayed by injunction, a *new rule* is not necessary to be given after injunction dissolved, nor a new demand of plea if there has been one previously given. If injunction, no new rule necessary.

After a rule to abide by a plea, or plead such other, defendant can only plead the *general issue*, and give notice of set-off; or he may, with leave, plead the set-off. *Cockran v. Robertson*, 1 Term Rep. 693. Rule to abide by plea, what plea may be pleaded.

If under a judge's order to plead issuably, the defendant puts in a plea, though *informal*, which goes to the substance of the action, the plaintiff cannot sign judgment, as for want of a plea. *Thelluson v. Smith*, 5 Term Rep. 152. When cannot take judgment for want of plea, although plea is informal.

It is an invariable practice of the court to grant *one rule only*, to set aside an irregular judgment and the subsequent proceedings on that judgment, in whatever mode the party may have proceeded after the judgment. *Barlow v. Kaye*, 4 Term Rep. 689. One rule to set aside irregular judgment, and subsequent proceedings.

Where the plaintiff files common bail for the defendant, on any day between the 2d and 6th of November, and he is in other respects entitled to sign judgment, it is signed as *on the day preceding the essoign day of Michaelmas term*. *Wansey v. Moore*, 5 Term Rep. 65. Of judgment signed before essoign of Mich. term.

In an action on a judgment the defendant cannot apply to stay the proceedings pending error on that judgment, until he has put in bail. *Smith v. Shepherd*, 5 Term Rep. 9. No stay of proceedings pending error till bail put in.

A defendant in replevin, is *not* entitled to move for judgment as in the case of a nonsuit. *Shortridge v. Hiern*, 5 Term Rep. 400. Nonsuit in replevin.

The court will not grant a *new trial* for the purpose of letting the party into a defence which he might have made at the first trial. *Salk*. 653. 1 Wils. 98. 1 Term Rep. 84. New trial.

The plaintiff is not bound to give notice of trial till the term after that in which issue is joined. *Hall v. Buchanan*, 2 Term Rep. 734. When not bound to give notice of trial.

Any attendance on any judge's summons, for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance, and as effectual, as an Attendance on a judge's summons half an hour.

hour's attendance on any summons has heretofore been.
Rule, Trin. Term, 35 Geo. 3. 6 Term Rep. 402.

Master to be attended on first appointment. *Ordered*, that on every appointment to be made by the master, the party on whom the same shall be served shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed, *ex parte* on the first appointment. *R. Hil. 32 Geo. 3. 4 Term Rep. 580.*

Oyer of original not allowed. *Ordered*, that a defendant be *not* allowed oyer of an original writ; and that if he demand it, the plaintiff may proceed as if no demand had been made. *R. Trin. 19 Geo. 3.*

Days to plead after oyer delivered. The defendant has as many days to plead after oyer of a deed is delivered, as he had when it was demanded. *Webber v. Austin, 8 Term Rep. 356.*

Special original, proceeding by. *Ordered*, that in all actions by special original writ; if plaintiff recover *less than* 50l. he shall not be allowed more costs than he would be entitled to in case he had proceeded by bill, (except in such actions in which he could not proceed by bill: or in which any defendant shall be actually outlawed.) *R. M. 23 Geo. 3.*

Prisoners having day rules, to return by nine. The rules of *E. 30 Geo. 3.* and *M. 37 Geo. 3.* as to having day rules, and additional day rules, are now repealed, but not to extend to, or repeal or discharge so much of the rule of *E. 30 Geo. 3.* as requires that every prisoner having a day rule, shall return within the walls, or rules, of the said prison, at or before nine in the evening of the day, for which such rule shall be granted. *6 East, 2.*

Bail-pieces. *Ordered*, that the clerk of the bails mark the bail-pieces numerically as they are received. *E. T. 30 Geo. 3.*

Cus. brev. *Ordered*, that the *custos brevium* shall endorse on every writ, on what day, and at what hour the same was filed. *R. Trin. 30 Geo. 3.*

Writs to be returned by the sheriff. *Ordered*, that in future all writs shall be returned by the sheriff, on the day on which the rule for returning the same shall expire; in default, plaintiff to be at liberty to move for an attachment on the next day. *R. Trin. 32 Geo. 3.*

Affidavits sworn in court to be filed, and copies taken before read. *Ordered*, that affidavits to be read in court, or before the master, be brought to the clerk of the rules, to be filed in such convenient time, that copies of them may be duly made and delivered to the party filing the same. *R. M. 9 Geo. 2.*

Tuesdays and Fridays are called *paper days*, for going through the paper of causes, wherein *conciliums* have been moved for, on the *civil side*; and *Wednesday* and *Saturday* for transacting business on the *crown side*. But no cause can be set down on the *first* paper day, or on the *four last days of business in term*: yet upon the day which would otherwise be the last paper day, *common demurrers* may be set down (unless it be the *last day of the term*,) where no argument is required.

Paper days where conciliums are moved for.

Common demurrers without argument,

Special causes must be argued in the order they are entered, unless the court shall, for reasonable cause, *verified by affidavit*, upon application made by either of the parties, by counsel, at least two days preceding, otherwise order. *Cutler v. Powell*, 6 Term Rep. 320.

Must be argued as entered, unless, &c.

Ordered, that all enlarged rules to shew cause made in the last term, shall be moved for before the last day of the present term, unless leave for postponing them shall be particularly applied for and granted. *M. T. 30 Geo. 2. 1 Burr. 9.* And all causes shall come on to be argued in the same order that they are entered, and that they shall continue to stand in the paper in the same order till they shall be argued, (without being entered a-new,) and that *no cause* shall be put off without a *special application* to the court upon some special ground, *before* the day upon which it stands in the paper for argument. *Ibid. 52.*

Enlarged rules.

And to be argued in the order they are entered.

Ordered, that every rule, which shall be enlarged to the next subsequent term, shall be fixed to a particular peremptory day; namely, the *first five* enlarged rules either on the *criminal* or *civil side* of the court, (as they may happen) for the first day of the next term; the *second five*, for the *second day* of it; the *third five*, for the *third day*; and so on, *toties quoties*, to the sixth, seventh, eighth, ninth, tenth, and following days of such subsequent term; and that *after every term*, there be a list made out and fixed up in the offices, both on the *crown* and *civil side of the rules so enlarged*, and the *particular days* when the respective motions are to come on; and that a copy of such lists be delivered to the judges respectively, the day before the beginning of every term. *Hil. 6 Geo. 3.*

Rules enlarged to be fixed for peremptory days, and lists to be made thereof.

It is ordered, that all rules enlarged till the next term be peremptory; and that *eight* be set down for every day; and the like for every future term. *R. M. 17 Geo. 3.*

Eight for each peremptory day.

Special cases when to be set down. All *special cases* shall be entered *within the first four days of the term next after the trial*; and none shall be set down on any of the *four last days of the term*. *R. M. 38 Geo. 3. 7 Term Rep. 454.*

No rules entered in peremptory paper shall be enlarged without leave. *Ordered*, that no rules entered in the *peremptory paper* be *enlarged* during the term, or put off by the appointed day, by consent of counsel, or the attornies concerned therein, without previous application to, and special leave of the court. *R. E. 41 Geo. 3. 1 East. 496.*

Special verdicts. *Special verdicts* to be set down within the *first four days of the term*, otherwise to be mentioned to the court on the motion for the concilium. *1 Burr. in pref. 6.*

Special cases. *Special cases* the *first four days* of the next term after trial, and not in any of the *four last days*. *R. M. 38 Geo. 3.*

Arrest of judgment. Motions in arrest of judgment may be made *within the first four days of the term*, but *Sunday* is *not* to be esteemed one of the *four*. *4 Burr. 2130. Mich. Term, 7 Geo. 3.*

A motion may be made in arrest of judgment, after a rule for a new trial has been discharged, and at any time before the judgment is signed. *Dougl. Rep. 745. Taylor v. Whitehead.*

New trials. Motions for *new trials*, ought to be made *within the first four days*, but in case of delay occasioned by no wilful act of the party, it may be moved for on the *fifth day*, viz. where counsel had neglected to move. *Dougl. Rep. 171. Bert v. Barlow.* And where the attorney was taken ill, and died on the road to London. *Doe ex dem. Davie and others v. Haddon and others, E. T. 1784.*

New trial and arrest of judgment. Motion for a new trial, and a motion in arrest of judgment, may not be made both together, the former must precede. *1 Burr. 334. Rex v. White.*

Motion in arrest of judgment may be made on the crown side. Motion in arrest of judgment may be made on the crown side, at any time before sentence pronounced. *2 Burr. 801. Rex v. Robinson.*

After conviction. After conviction of a *misdemeanor*, the defendant must be present in court, if he would move in arrest of judgment; though he need not be so, upon arguing a special verdict. *2 Burr. 930. Rex v. Spragg.*

When personal appearance may be dispensed with. *Personal appearance* of a defendant convicted of a *misdemeanor* ought not to be dispensed with (upon his clerk in court undertaking for the fine), unless it be clear, *that "the punishment will not be corporal, only pecuniary, and*

"not in every case even of that kind." 3 Burr. 1787. *Rex v. Hann.*

Ordered, that attachments be absolute in the first instance: "First, for nonpayment of costs on the master's allocatur; secondly, against a sheriff for not obeying a peremptory rule to return a writ, or bring in the body; thirdly, for contempt of the court in the execution of the process of the court." R. Tr. 17 Geo. 3.

Attachment when absolute in the first instance.

On the last day of a term an attachment cannot be moved for, except first for nonpayment of costs. 5 Burr. 2686. 2dly, Against a sheriff for not returning a writ. 1 Burr. 657. Trin. 31 Geo. 2. And, 3dly, For not bringing in the body.

When may be moved for on the last day of term.

And counsel may move on the last day of term, to quash an indictment, but not to quash an order. *Ibid.*

Indictment.

A defendant being brought up for judgment after conviction, stands committed, pending the consideration of the judgment, unless the prosecutor consent to his standing out on bail. *Rex v. Waddington*, 1 East Rep. 159.—The court has no discretion to exercise.

After conviction, defendant is to be committed, unless prosecutor consent to his being on bail.

On the last day of term, a motion to answer the matters of an affidavit cannot be made. 4 Burr. 2502. *Jacob's case.*

Answer.

If pending an argument on a special verdict, and the court takes time to consider thereon, either party dies, the judgment will be ordered to be entered as of the term in which judgment ought to have been signed. 1 Burr. 226, 147. 4 Burr. 2277.

If pending argument either party dies.

A prisoner who is supersedeable for want of filing a bill against him in time, waives the irregularity by pleading. *Pearson v. Rawling*, 1 East Rep. 77.

When irregularity waived.

Ordered, in all cases where a rule is obtained to set aside proceedings for irregularity, with costs; and such rule is discharged generally, without any special direction upon the matter of costs, it is understood to be discharged with costs, and the latter rule must be drawn up accordingly. R. M. 37 Geo. 3.

Rule to set aside proceedings for irregularity with costs.

No rules, orders, or notices, in any cause shall be served, or any proceedings or pleadings delivered or served later than ten at night; and service after that hour shall be void. R. M. 41 Geo. 3. 1 East. 132.

Notices, &c. to be delivered, not later than 10.

Ordered, that a committitur on every judgment against a prisoner, shall be filed with the clerk of the dockets, against prisoners.

Filing of com. against prisoners.

on or before the last day of the term in which such prisoner is to be charged in execution; and to be entered on record within four days after the end of such term. *R. E. 41 Geo. 3. 1 East. 410.*

If court divided equally. If the court are equally divided, no judgment can be given. *7 Term Rep. 582. Cowley v. Dunlop.*

If no day specified in an act of parliament. Where no specific day is mentioned in an act of parliament from which it is to take effect, it commences by legal relation from the first day of the session. *Latless v. Holmes, 4 Term Rep. 660. 6 Bro. P. C. 553.*

ARREST. (a)

At common law not liable to arrest. AT common law the defendant was not liable to be arrested for civil injuries, unaccompanied by force. *3 Co. 12.* This immunity of the defendant's person, in case of peaceable, though fraudulent injuries, producing great contempt of the law, in indigent wrong doers, a *capias* was allowed to arrest the person in actions of account, though no breach of the peace were suggested, by the *statute of Marl.* *52 H. 3. c. 23.* and *Westm. 2. (13 Ed. 1. c. 11.)* in actions of debt and detainue, by *stat. 25 Ed. 3. c. 17.* and in all actions on the case, by *stat. 19 H. 7. c. 9. 3 Black. Com. 281.*

Arrest. An arrest in a civil cause is defined to be, the apprehending or restraining one's person by process in execution of the command of some court, or officer of justice, *Wood's Inst. 575.* And must be by corporal seizing or touching the body of defendant. *1 Vent. 306. Cowp. Rep. 165.*

How near officer need be, on arrest. In making the arrest, it is not necessary that the officer who has the authority should be the hand that arrests, nor in the presence of the person arrested, nor actually in sight: it will be sufficient if he be near, and acting in the arrest. *Cowp. Rep. 65. Blatch v. Archer.*

The arrest cannot be made on a Sunday, except an escape or by bail. No arrest can be made, or process served, on a Sunday, except for treason, felony, or breach of the peace. *29 Car. 2. c. 7. sect. 6. 1 Salk. 78.* But the service of every such writ, &c. shall be void, and the person executing same shall be liable to answer damages to the party grieved, as if he had done same without any writ. *3 East. 155.*

(a) For this head, see my *Office of Sheriff and Coroner*, 3d ed. p. 52.

After a negligent escape the defendant may be retaken on a *Sunday*, and that either by the officer, or upon a fresh pursuit, or by virtue of an escape warrant. 2 *Ld. Ray.* 1028. 2 *Salk.* 626. Also bail may take their principal upon a *Sunday*, in order to surrender him. 1 *Atk.* 239. 6 *Mod.* 231.

By *stat.* 12 *Geo.* 1. c. 29. made perpetual by 21 *Geo.* 2. e. 3. it is enacted, "That no person shall be held to special bail on any process issuing out of any superior court, where the cause of action shall not amount to 10*l.* or upwards: and in all cases where the cause of action shall not amount to 10*l.* or upwards, in any superior court (and the plaintiff shall proceed by the way of process against the person), he shall not arrest the body of the defendant, but shall serve him, &c. personally with a copy of the process.

None to be held to special bail in superior court under 10*l.*

"That in all cases where the plaintiff's cause of action shall amount to more than 10*l.* affidavit shall be made and filed of such cause of action (which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorized to take affidavits in such courts, or else before the officer who shall issue such process, or his deputy,) which oath such officer, or his deputy, are hereby empowered to administer; and for such affidavit one shilling, above the stamp duties, shall be paid, and no more; and the sum specified in such affidavit shall be endorsed on the back of such writ or process; for which sum the sheriff, or other officer to whom such writ or process shall be directed shall take bail, and for no more. But if any writ or process shall issue for 10*l.* or upwards, and no affidavit or indorsement shall be made as aforesaid, the plaintiff shall not proceed to arrest the body, but shall proceed in like manner as is by this act directed in cases where the cause of action does not amount to ten pounds, or forty shillings, or upwards, as aforesaid." *Ibid.* sect. 2.

Where the cause of action amounts to 10*l.* affidavit to be made thereof, and the sum endorsed on the back of the writ.

Where there is no affidavit.

And by 19 *Geo.* 3. c. 70. the provisions of the 12 *Geo.* 1. c. 29. are extended to inferior courts.

Before the making of these acts, a defendant might have been arrested for any sum of money, however trifling or inconsiderable, upon a mere suggestion, without any affidavit of its being due,

The defendant having been arrested by the sheriff at An arrest on the suit of another plaintiff, on *Saturday. Nov. 3.* was Saturday at

suit of another plaintiff, the defendant discharged.

There was at the same time a detainer in the office, and he was arrested on a Sunday; a court discharged the defendant.

discharged on same day; the sheriff not knowing that at that time there was a detainer lodged in his office against him at suit of this plaintiff; this being afterwards discovered, the defendant was arrested on this writ on the next day, *Sunday*: motion to discharge him, arrest being contrary to the statute 29 Car. 2. *Lord Kenyon*. The defendant was not in the sheriff's custody in this action before the second arrest. But even if he had been, the distinction between a voluntary and negligent escape is recognised in *Featherstonhaugh v. Atkinson*, *Barn.* 373. If a party wrongfully escape from the custody of the law, he may be retaken at any time, and is not protected by the statute, which forbids an original arrest on *Sundays*. But here the defendant was not guilty of any contempt; he was regularly discharged on the Saturday, the sheriff not even knowing that he was authorized to detain him. *Rule abs. 5 Term Rep.* 25. *Atkinson v. Jameson*.

No person to be held to special bail under 15l. (unless on a bill of exchange or promissory note.)

But now by *stat. 51 Geo. 3. c. 124. s. 1.* it is enacted, that after the first day of *Nov.* 1811, no person shall be held to special bail upon any process issuing out of any court, where the cause of action shall not have originally amounted to 15l. or upwards, over and above and exclusive of any costs, charges and expences that may have been incurred, recovered, or become chargeable in or about the suing for or recovering the same or any part thereof, except where the cause of such action shall arise or be maintainable upon or by virtue of any bill or bills of exchange, promissory note, or promissory notes, in which cases the parties liable thereupon may be held to special bail in such manner as if this act had not been made. And in all cases where the cause of action shall not amount to 15l. or upwards, exclusive of such costs, charges, and expences as aforesaid, (except as before excepted,) the plaintiff or plaintiffs shall proceed by way of process against the person, he, she or they shall not arrest the body of the defendant or defendants, but shall serve him, her, or them personally within the jurisdiction of the court, in such manner as directed by the statute 12 Geo. 1. is provided, in cases where the cause of action shall not amount to 10l. or upwards in any superior court, or to 40s. or upwards in any inferior court. And that where the cause of action in any court shall not amount to 15l. exclusive of such costs, charges, and expences as aforesaid (except as before excepted,) no special writ or writs, nor any process specially therein expressing the cause or causes of action, shall after the said 1st of *November* be

No special writ to be sued to compel appearance under 15l.

issued from any court, in order to compel any person or persons to appear thereon in such court, and all proceedings and judgments that shall after the said 1st day of *November* be had on any such writ or process shall be and are hereby declared to be void and of no effect. *Sect. 1.*

That the provisions in 19 *Geo. 3. c. 70.* respecting actions in inferior courts, where the cause of action should amount to less than 10*l.* shall be after the said 1st day of *November* extended to all actions in such courts where the cause of action shall not amount to 15*l.* exclusive of such costs, charges and expences, as aforesaid, (except where such cause of action shall arise, or be maintainable upon or by virtue of any bill or bills of exchange, promissory note or promissory notes, in which cases the parties liable thereupon may be held to special bail in such manner as if this act had not been made.) And that so much of any act or acts of parliament heretofore passed for the recovery of debts within certain districts and jurisdictions, which may have authorized the arrest or imprisonment of debts where the cause of action amounts to less than 15*l.* exclusive of such costs, charges, and expences as aforesaid, shall be and hereby is after the said 1st day of *November* repealed. *s. 3.* The act to continue in force until 1st *November*, 1816, and till the end of the then next sessions of parliament, and no longer. Not to extend to *Scotland* or *Ireland.* *s. 4.*

19 *Geo. 3.* respecting actions for sums less than 10*l.* extended to sums under 15*l.*

So much of acts authorising arrests contrary to the above, repealed.

This act to remain in force till 1st Nov. 1816.

Not to extend to *Scotland* or *Ireland.*

By the 11 & 12 *W. 3. c. 9. sect. 2.* "No sheriff or other officer within the principality of *Wales*, or counties palatine, upon any writ or process issuing out of any of his majesty's courts of record at *Westminster*, shall hold any person to special bail, unless an affidavit be first made in writing, and filed in that court, out of which such writ or process is to issue, signifying the cause of action, and that the same is twenty pounds and upwards; and where the cause of action is twenty pounds and upwards, bail shall not be taken for more than the sum expressed in such affidavit."

No sheriff, &c. in *Wales*, or counties palatine shall hold persons to special bail, unless the cause of action be 20*l.*

Bail not to be taken for more than expressed.

By 1 *Geo. 2. c. 14. sect. 15.* No person who shall list and enter himself to serve his majesty, as a seaman on board any of his majesty's ships or vessels, shall be liable to be taken out of the service by any process or execution, other than for some criminal matter, unless for a real debt, or for other just cause of action, and unless before taking out such process or execution, not being for a criminal matter, the plaintiff or some other person on his behalf, shall make affidavit before one or

No seaman shall be liable to be taken out of his majesty's service otherwise than for some criminal matter, unless the debt amount to 20*l.*

more judge or judges of the court of record, or other court out of which such process or execution shall issue, or before some person authorized to take affidavits in such courts, that to his or their knowledge the sum justly due and owing to the plaintiff or plaintiffs from the defendant or defendants, in the action, or cause of action, on which such process shall issue, or the debt or damage and costs for which such execution shall be issued out, amounts to the value of 20l. at the least, a memorandum of which oath shall be marked on the back of such process or writ, for which no fee shall be taken; and if any person shall be arrested contrary, it shall be lawful for one or more judge or judges of such court, upon complaint made by the party himself, or by any his superior officer, to examine into the same by the oath of the parties, or otherwise, and by warrant to discharge such seaman so arrested, without paying any fee, upon due proof made that such seaman was actually belonging to one of his majesty's ships or vessel, and arrested contrary to this act, and also to award to the party so complaining such costs, as such judge or judges shall think reasonable: for the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the said action might have had for the recovery of his costs, in case judgment had been given for him, with costs, against the defendant in the said action.

As to a debt contracted after he has entered into his majesty's service.

If arrested, court will enter an exoneretur.

Plaintiff upon notice, &c. may enter a common appearance, and proceed to judgment, &c.

By 32 Geo. 3. c. 33. s. 22. "No seaman can be taken out of the king's service by any process, &c. for a debt to any amount contracted after he was in the service: nor by any process, &c. for a debt under 20l. for a debt contracted before he was in the king's service;" and if arrested contrary to the above act the court will immediately enter an *exoneretur* upon the bail-piece. 7 East. 405. *Robertson v. Patterson*.

That any plaintiff, upon notice first given in writing of the cause of action, to such seaman or seamen in his majesty's service, or left at his or their place of residence, before his entering into his majesty's service, to file a common appearance in any action to be brought for or upon account of any debt whatsoever, so as to entitle such plaintiff to proceed to judgment and outlawry, and to have execution, other than against the body or bodies of him or them so actually belonging to one of his majesty's ships as aforesaid. Sect. 16.

A seaman upon the ship books, though he has absented himself, is a seaman within the act, *Barnes*, 95. Armourers, gunners, &c. enlisted as common seamen, are within it. *Barnes*, 114. 1 *Str.* 2. 7. 1 *Black. Rep.* 30. Who are within the act.

By *stat.* 46 *Geo.* 3. c. 66. s. 78. "No person who is or shall enlist, &c. as a volunteer, as a soldier, shall be liable to be taken by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, or other just cause of action, and unless before the taking out such process or execution (not being for a criminal matter), the plaintiff or some person on his behalf shall make affidavit, &c. that to his or their knowledge the original sum justly due and owing to the plaintiff from the defendant, in the action, or cause of action, on which such process shall issue, or the original debt for which such execution shall be sued out, amounts to 20l. at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded; a memorandum of which oath shall be marked on the back of such process or writ; and if any person shall be arrested contrary, it shall be lawful for one or more judge of such court, upon complaint made thereof by the party himself, or by any of his superior officers, to examine into the same by the oath of the parties or otherwise, and by warrant under his or their hands and seals, to discharge such soldier, without fee, upon due proof made that such soldier so arrested was legally enlisted as a soldier in his majesty's service, and arrested contrary to the intent of this act; and also to award to the party so complaining such costs as such judge shall think reasonable; for the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the like action might have had for the recovery of his costs, in case judgment had been given for him with costs against the defendant in the said action." No volunteer soldier liable to process, unless for a real debt of 20l. 2 *Term Rep.* 270. Oath of the debt to be made before a judge, &c. and a memorandum thereof marked on the back of the process.

Sect. 66. "Any plaintiff, upon notice first given in writing, of the cause of action to such person or persons so entered, or left at his or their last place of residence before such enlisting, to file a common appearance in any action to be brought for or upon account of any debt whatsoever, so as to entitle such plaintiff to proceed therein to judgment and outlawry, and to have an execution thereupon, other than and against Plaintiff may file common appearance, and proceed to execution against the goods.

“ the body or bodies of him or them so enlisted as afore-
“ said.”

Who are
within the
act.

Who are not.

They may sur-
render in dis-
charge of their
own bail.

To whom this
act does not
extend.

Other acts as
to land forces
and marines.

No person
shall be arrest-
ed on any pro-
cess, &c. for
a cause not
amounting to
such sum for
which he is
now by law
liable to be
so, exclusive
of costs.

Persons ar-
rested on
mesne pro-
cess, instead
of giving bail
may deposit
with the
sheriffs, &c.
the sum en-
dorsed on the
writs, with
10l. to answer

Serjeants are within this act as well as private men, so is a drummer. 1 *Black. Rep.* 29. 1 *Wils.* 216. So is a gunner in the train of artillery. *Stra.* 7. So a trooper just enlisted. 1 *Stra.* 1. So recruits just enlisted. But an outpensioner of Chelsea hospital is not. *Barnes*, 432.

But though they cannot be arrested, yet such person may be surrendered by their bail in their own discharge. 1 *Burr.* 339. *Bond v. Isaac*, 1 *Str.* 641. And the court will immediately set them at large.

This act does not extend to commissioned officers or soldiers imprisoned for disobeying orders of justices, 2 *Term Rep.* 270. Or any other criminal account, 5 *Term Rep.* 156.

By other acts of parliament, 29 *Geo.* 2. c. 4. s. 14. 30 *Geo.* 2. c. 8. s. 20, for the speedy and effectually recruiting of his majesty's land forces and marines, no person listed by virtue of those acts, shall be liable to be taken out of his majesty's service, by any process, other than for some criminal matter. But these latter acts were only meant to privilege such persons as were compelled to serve against their will. 1 *Burr.* 339, 466. *Bond v. Isaac*; or rather to prevent their being taken out of the service, by means of feigned actions.

By *stat.* 43 *Geo.* 3. c. 46. after 1st June, 1803, no person shall be arrested, or held to special bail, within England and Ireland, for a cause of action not originally amounting to such sum for which such person is, by the laws now in being, liable to be arrested and held to bail, over and above, and exclusive of any costs, charges and expences that may have been incurred, recovered, or become chargeable, in or about the suing for, or recovering the same; or any part thereof. *Sec.* 1.

All persons who shall, after 1st June, 1803, be arrested upon mesne process, in *England and Ireland*, shall be allowed in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him, his under sheriff, or other officer appointed for that purpose, the sum indorsed upon the writ, by virtue of the affidavit for holding to bail in that action, together with 10l. in addition to such sum, to answer the costs, which may accrue, or be incurred, in such action, up to, and at the time of the return of the writ; and such further sum, if

any, as shall have been paid for the king's fine upon an original writ; and shall thereupon be discharged from such arrest as to the action in which the deposit is made; and that the sheriff shall, in every such case at or before the return of the said writ, pay into the court, in which such writ shall be returnable, the money so deposited; and in case the defendant shall afterwards duly put in and perfect bail in such action, according to the course and practice of such court, the sum of money so deposited and paid into court as aforesaid, shall by order of the court, upon motion to be made for that purpose, be repaid to defendant; but in case the defendant shall not duly put in and perfect bail, then the money shall by order of the court, upon a like motion to be made, be paid over to the plaintiff, in such action, who shall be thereupon authorized to enter a common appearance, or file common bail, for such defendant, if the said plaintiff shall so think fit; such payment to be made subject to such deductions, if any, from the sum of 10l. deposited and paid to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the court in that behalf, may be found reasonable. *Sect. 2.* See *sect. 3.* of this act, where defendant shall be entitled to costs, where plaintiff shall not recover the amount of the sum for which he was arrested.

costs, &c. and be thereupon discharged from arrest. The deposit to be paid into court, who shall on perfecting bail, order it to be repaid; but on bail not being put in, the money shall be paid over to the plaintiff, &c.

Where the defendant is entitled to costs.

In the construction of this act, the court has holden that where money is paid to the sheriff upon an arrest, it shall be presumed to have been paid as a deposit in lieu of bail, unless a discharge, or some acknowledgment in writing be given to the defendant, for the debt and costs, 1 *Smith's Rep.* 127. And where the defendant puts in bail above, who on being excepted to render him instead of justifying, the plaintiff is not entitled to receive the money out of court; but the defendant, if he made the deposit, may in such case receive it back, *Chadwick v. Battye*, 3 *Maule and Selwyn*, 283.

Construction of the act.

When plaintiff is not entitled to the deposit.

If the sheriff do not take the deposit at the time of the arrest, he cannot relieve himself from an attachment for not bringing in the body by taking it afterwards. 9 *East*. 316. *Rex v. Sheriff of London*.

The sheriff must take the deposit at the time of the arrest.

" If a person procure another to be arrested in the
 " *Marshalsea*, or in any court within *London*, &c. at the
 " suit of any person, where there is no such person
 " known, or without the plaintiff's consent; every person
 " who shall procure any arrest, &c. and shall be accused

The penalty for arresting of any person at the suit of another, not knowing thereof.

" by indictment, presentment, or by the testimony of witnesses, or other due proof, shall suffer six months imprisonment, without bail or mainprize; and pay to the party arrested treble costs, and forfeit ten pounds for every such offence; to be recovered by action of debt, &c. against such persons, their heirs, executors, or administrators, as should or ought to pay the same, by virtue or force of this act; in which action no essoin shall be allowed." 8 *Eliz. c. 2. sect. 5.*

For what a Person may be held to Bail.

Where there is a certain demand, which amounts to 15l. or upwards, as for money paid, laid out, and expended, money lent and advanced, money had and received, a demand on an account stated and settled, goods sold and delivered, work done, covenant for payment of money, money due on bond, for fees and disbursements as an attorney, or an agreement to pay a certain sum to the plaintiff (not by way of penalty,) the defendant may be held to bail of course, on a concise affidavit, stating the cause of action, so also on a judgment recovered; or on a bill of exchange or promissory note to the amount of 10l. or upwards. See *ante*, page 100.

Executors,
&c.

So if there be a general judgment against the executor or administrator, if he has been guilty of a *devastavit*. 1 *Salk.* 98. 1 *Vent.* 355.

Heir, &c.

If an heir, executor or administrator, personally promises and undertakes in writing, to pay any debt, he may be arrested, if for 15l. or above. *Mackenzie v. Mackenzie*, 1 *Term Rep.* 716.

May be held
to bail on
judgment
against him,
but not on a

So he may be held to bail on a judgment by default against him after the sheriff has returned a *devastavit*. *Comb.* 206. *Carth.* 264. *Dupret v. Tesard*. But a mere suggestion is not sufficient.

Cannot be
held to bail in
trover without
a judge's order.

The defendant cannot now be held to bail in trover or detinue without a judge's order. *R. H.* 48 *Geo.* 3. 9 *East.* 325.

May be held
to bail on
26 *Geo.* 3.
c. 21.

In an action on 26 *Geo.* 2. c. 21. for having unsealed wrought silks in his custody, special bail is required by the eighth section, and in this case affidavit need not be positive, for the act does not require affidavit at all. 3 *Burr.* 1569. *Rex v. Rebord*.

In actions on 11 and 12 W. 3. for offences in exporting wool, defendant may be held to bail, but the cause of action must appear in the writ. In *scandalum magnatum* plaintiff may have special bail on motion and order. *Earl of Stamford v. Goodhall*, L. Ray. 74. 1 Sid. 183. 2 Mod. 215. So on 11 and 12 W. 3. So on scam. mag.

So the defendant may be held to bail on a statute which expressly authorizes an arrest, as for insuring lottery tickets. *Stat. 27 Geo. 3. c. 1.* 1 Term Rep. 705. *Davis v. Mazzenghi*, as to the form of the affidavit. So for double rent on holding over, on the stat. 4 Geo. 2. c. 28. See 5 Term Rep. 364. *Wheeler v. Copeland*, as to the affidavit. Also on a contract to transfer stock borrowed. *Adams v. Verells*, 1 Str. 497. So on the stat. 9 Ann. c. 14. which gives an action of debt against the winner, by gaming, it being at the suit of the party grieved. 2 Str. 1079. *Tanner v. Warren*. So on statutes.

It is laid down, that a defendant cannot be held to bail for a penalty, but only for the sum secured by the penalty, 6 Term Rep. 217. *Hatfield v. Linguard*. And in one case, which was debt on bond conditioned for the indemnification of a parish against a bastard child, the penalty was 50l. the plaintiff swore that he was indebted to him in that sum; defendant swore that only 3l. and odd shillings were really due. On motion for common bail; the court said; plaintiff's conduct was altogether unjustifiable, and that he was liable to an action. That in the case of a bond conditioned for the performance of a promise of marriage, and in some other instances, the penalty is the real debt; but in other cases, the bail could only be taken for the sum to which the plaintiff would be entitled in damages for the breach of the condition. *Kirk v. Strickland*, Doug. 449. M. 21 Geo. 3. But in *Willes v. Dent*, Hil. 23 Geo. 3. the affidavit was, that defendant was indebted in 1000l. under and by virtue of a certain covenant contained in an agreement, the court refused a rule nisi for common bail. *Sell*. 44. If founded on a penalty. In debt on bond conditioned for an indemnification defendant ought not to be held to bail for the penalty, but only for the amount of the damages incurred.

Where a bond is given, conditioned for the payment of money, the plaintiff may hold to bail for the amount of the real sum due, with interest; but if they be bonds of indemnity, or for performance of covenants, then to the amount of the real damage sustained by the breach of the condition, provided the same be for payment of money, or a sum for every acre of land plowed up. *Barn*. 108. But if the penalty be the real debt, and in nature of stated damages, as in bond for performance of What bonds defendant may be held to bail for, and what not.

marriage, *Barn.* 86, or to deliver goods, or forfeit 100l. then to the full amount of the penalty. *Vide Sid.* 63. *Salk.* 100.

In Debt on the Judgment.

In debt on judgment.
If no bail given in the original action.

In debt on the judgment, a defendant may be held to bail, though he might have pleaded bankruptcy to the first action. 1 *Str.* 477. *Combs v. Blackhall.* So if no bail be given in the original action, although a writ of error be brought and bail given on the writ of error. *Com. Rep.* 556.

Debt under 10l. and increased by costs.

So where the debt was under 10l. and increased to more than the sum by costs taxed, the defendant may be held to bail. 4 *Term Rep.* 570. *Lewis v. Pottle.*

In action on judgment plaintiff is not to have costs, unless otherwise ordered.

But now see the stat. 43 *Geo.* 3. c. 46. whereby it is enacted, that in all actions which shall be brought in *England* or *Ireland*, upon any judgment recovered, or which shall be recovered, in any court in *England* or *Ireland*, the plaintiff or plaintiffs in such action on the judgment shall not recover, or be entitled to any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same court, shall otherwise order. *Sect.* 4.

Levy.

The next section gives a power to levy under a *f. fa.* the poundage, fees, and expences, over and above the sum recovered by the judgment.

Balance considered to be the debt in law as well as in equity.

Where there have been mutual dealings between the parties, the balance is considered as the debt in law, as well as in equity; and therefore, upon an unliquidated account, if the plaintiff were to swear to the sum due to him, on the debtor side only, it would be looked upon as a mere evasion; and entitle the defendant to an action upon the case, for a malicious arrest. *Dr. Turlington's case*, 4 *Burr.* 1996.

In what Cases Defendant may be held to Bail a second Time.

The general rule is, when defendant has been once arrested, he cannot be arrested again for the same cause of action. *Nemo debet bis vexari pro eadem causa.*

If a second writ pending the first is

But where the defendant was arrested on a writ, pending the first cause, and wherein he had been previously arrested, the court said, the plaintiff had been too quick,

for he should have had the costs taxed and paid before taken out, he took out the new writ, and discharged the defendant common bail. on common bail. *Belifante v. Levey*, 2 Str. 1209.

In a similar case, where it appeared that the bail in the prior action were forsworn, the court refused to assist the defendant, and said the plaintiff was right in laying hold of him as he did, for had he discontinued before, the defendant would probably have run away, and therefore discharged the rule for common bail. *Olmus v. Delany*, Str. 1216.

So where A having been arrested at the suit of B, gave him a draft for a part of the demand, and agreed to settle with him in a few days, after which the draft being dishonoured, B sued out a new writ against A on the same affidavit; this was holden to be regular. 6 Term Rep. 52.

Where the plaintiff is nonprossed for want of declaration, and he pays the costs, it was holden that he may again arrest the defendant, for he suffers enough by paying the costs, and therefore ought not to be in a worse condition than before. *Turton v. Hayes*, Str. 439. Formerly otherwise. 1 Ld. Ray. 679. Com. Rep. 94. S. C.

The defendant being arrested for 25l. lay in gaol till he was superseded. The plaintiff meeting him afterwards, got a note of him for 20l. and brought a fresh action upon it, and held him to bail, but the court discharged him upon common bail, for it is but a farther security, and does not extinguish the former cause of action, which may be declared upon still. *Taylor v. Wasteneys*, 2 Str. 1218. and see 8 East. 334. *Daniel v. Dodd*.

The defendant was arrested on an illegal warrant, and ordered to be discharged. 6 Term Rep. 123. M. T. 35 Geo. 3. The plaintiff discontinued the action, and held defendant to bail a second time. Motion to discharge him—The general rule, that a defendant cannot be held to bail twice for the same cause of action was admitted; but it was said, there was an exception from that rule when he was discharged the first time for some act, over which the plaintiff had no control; and for which he was not answerable, which the court allowed: and discharged the rule. *Housie v. Barrow*, 6 Term Rep. 218.

So where he misconceives his action, and moves to discontinue, and pays the costs, he may take out a new writ, and hold the defendant to bail *de novo*. 2 Wils. 381. *Bates v. Barry*.

But where the bail had justified for 2334l. and the

Where a man was held to bail in a second action, pending first.

An arrest and a draft given and dishonoured, a new writ may issue on same affidavit.

After nonpross, defendant shall give bail to second action.

Common bail, though on a note given after a former action, where in defendant was superseded.

May be held to bail a second time, if no fault of plaintiff on the first.

So where action is misconceived.

But not when bail justified

without leave
of court.

plaintiff not liking them, obtained the usual side-bar rule to discontinue, not disclosing that bail had justified; and then brought a new action on the same bonus, and laid the venue in *Middlesex* instead of *London*, made a fresh affidavit of the debt, and had the declaration marked by the clerk of the rules to charge him in custody, in order to detain him till the next term; on disclosing the matter by the clerk of the rules to the court, the court sent for the attorney, whose counsel cited the case in *Str.* 1216. as in point. The court at first hesitated what to do; but held it to be a trick, and an unwarrantable conduct in the attorney, and that it should not have the intended effect, for he ought to have asked leave of the court to charge the defendant in custody, disclosing the whole of the case to them; and at first thought of making a rule to shew cause why the plaintiff should not be at liberty to do so. But at length they discharged the side-bar rule, which gave plaintiff leave to discontinue. So that the bail to the former action (who had justified) still remained liable to their recognizance. *Belchier v. Gansel*, 4 *Burr.* 2052.

Nonsuit.

If there be a nonsuit on the merits, plaintiff cannot arrest again, aliter on a slip or informality.

If superseded.

If the defendant has been superseded, by the plaintiff's laches, he cannot be arrested again. *Taylor v. Wasteneys*, 2 *Str.* 1218. Nor in an action on the second judgment. *Chambers v. Robinson*, *Ibid.* 782.

Award.

But where special bail was put in, and afterwards the cause referred by bonds of arbitration, and an award made above 10l. The defendant may be held to bail again in an action on the judgment, for the reference put an end to the first action. *Collins v. Powell*, 2 *Term Rep.* 756. But now see *stat.* 43 *Geo.* 3. c. 46. s. 4.

If a draft be
given by de-
fendant to
plaintiff,
where he said
it would be
paid imme-
diately, and
plaintiff dis-
charged him
out of custo-
dy. If such
draft be not
paid, may
arrest him
again on same
affidavit.

The defendant having been arrested for 80l. on a *testatum capias*, into *Surrey*, gave plaintiff a draft of 45l. saying it would be paid immediately, and agreed to meet the plaintiff a few days afterwards to settle the remainder of the debt, on which plaintiff agreed, that defendant should be discharged out of custody. The draft was dishonoured, the defendant having no effects in the hands of the drawee; on which defendant was again arrested on the same affidavit on a *testatum capias* in *Middlesex*, and moved to be discharged out of custody. *Lord Kenyon*. In cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it

expects it to be, and therefore he may consider it as a nullity, and act as if no such bill had been given at all.
Rule disch. Puckford v. Maxwell, 6 Term Rep. 52.

One who was discharged out of custody upon an arrest in a former action, for default of the plaintiff in not declaring against him in time, cannot be holden to special bail under a second writ, for the same cause of action in substance; the first affidavit to hold to bail being adapted to a demand in trover for goods, and the second for money had and received, upon a supposition that the goods had been sold by defendant for plaintiff, and the money received to his use. *Imlay v. Ellefsen, 3 East. 309. See Taylor v. Wasteneys, 2 Str. 12. 18. cited by Mr. Justice Lawrence*, where he says, however ill the defendant may have behaved, we are not to punish him by confining him in prison upon a second arrest for the same cause as before. In this case *Lord Ellenborough* said, it is harsh enough to deprive men of their liberty as a security for debt in the first instance; but after having continued the defendant in custody until the plaintiff having lost the benefit of it, by his own default, I should require a very strong case to induce me to consent to a further imprisonment.

One who has been superseded for want of declaration in time, cannot be held to bail again for same cause.

In what Actions Defendant cannot be held to Bail.

But where the damages are uncertain, as in covenant, where no money is covenanted to be paid, trespass, assault, battery, conspiracy, assault and false imprisonment, slander (except in slander of title,) actions against bail on the bail-bond, replevin-bond, *Salk. 99. (a)* penal statutes, (unless expressly enacted,) malicious prosecutions, action for crim. con. debt on recognizance of bail, the defendant cannot be held to bail of course.

Where the defendant cannot be held to bail.

In actions of assault, imprisonment, scand. magn. and other personal wrongs, in which it is apparent the damages will exceed 10l. the court, or any judge, on an affidavit of the circumstances, will give leave to the plaintiff to sue out a writ to hold defendant to special bail; but in these cases, it must be stated, that the defendant is going to quit the kingdom. *Sid. 307. Ray. 74. Lev. 39. N. on R. M. 8 Ann. 1 Salk. 99.*

Judge's order or rule of court.

In an action of debt upon judgment, whether after verdict or by default, the defendant cannot be arrested, if judgment.

(a) Whether the action be brought in the name of the sheriff or his assignee. *6 Term Rep 336.*

he was previously held to bail in the original action. *Say. Rep.* 160. So in *C. P.* 2 *Black. Rep.* 768. *Kendal v. Carey.* 6 *Term Rep.* 757. *Collins v. Powell.*

Second judgment.

Bail cannot be had in an action on the second judgment where bail has been given on the first. *Chambers v. Robinson,* 2 *Str.* 782.

Penalty.

Nor can defendant be held to bail for a penalty, but only for the sum secured by the penalty. *Hatfield v. Linguard,* 6 *Term Rep.* 217.

Penal stat.

Nor in an action of debt on a penal statute. *Yelv.* 53. *Gilb. C. P.* 37.

OF PERSONS PRIVILEGED FROM ARREST.

THE *Royal Family*, 2 *Inst.* 50; peers of the realm of *England*, and peeresses, as well by birth as by marriage, 1 *Inst.* 131. 2 *Inst.* 50; peers and peeresses of *Scotland*, 5 *Ann. c.* 8. art. 13. 2 *Str.* 990. *Fort. Rep.* 165. And now by stat. 39 & 40 *Geo.* 3. c. 67. lords of parliament on the part of *Ireland* in the House of Lords of the united kingdom are privileged. This privilege does not extend to peeresses by marriage, if they afterwards intermarry with commoners. *Co. Litt.* 16. *Dy.* 70. Peers are not liable to be attached for the non-payment of money, pursuant to an award of *nisi prius*, which has been made a rule of court. *Walker v. Earl of Grosvenor*, 7 *Term Rep.* 171. and *Ld. Falkland's case*, *E.* 36 *Geo.* 3. cited in *Tidd.* 56. But this privilege will not exempt them from attachments, for not obeying the process of the court. 1 *Wills.* 332. *Rex v. the Bishop of St. Asaph.*

How long a time the privilege extends.

By the law and custom of parliament members of the House of Commons of the united kingdom, not only during the actual sittings of parliament, but for a convenient time sufficient to enable them to come from, and return to, any part of the kingdom, before the first meeting, are privileged, and after the dissolution of it; and also for forty days after every prorogation, and before the next appointed meeting; which is now in effect as long as the parliament subsists, it seldom being prorogued for more than four-score days at a time. 1 *Black. Com.* 165. See the stat. 10 *Geo.* 3. c. 50. 2 *Str.* 985. *Fort.* 159. But this privilege does not hold in any of these three cases, treason, felony, or breach of the peace. 2 *Wils.* 159. *Rex v. Wilkes.*

And the court will not grant an attachment against such member for non-payment of money pursuant to an award. *Calmur v. Sir E. Knatchbull*, 7 Term Rep. 448.

No attachment against a member for non-payment of award.

Bishops, members of convocation, and their servants, have, by stat. 8 H. 6. c. 1. the same privilege as peers and members; and members of corporations aggregate, and hundredors, not being liable to a *capias*, cannot be arrested for any thing done in their corporate capacity, or on the statutes of hue and cry, &c. *Brooke, Ab. tit. Corporations*, 43. 3 Keb. 126, 7.

Bishops, members of convocation, and servants.

Members of corporations.

By the law of nations declared by stat. 7 Ann. c. 12. ambassadors, and other public ministers, and their servants are privileged from arrest. *Vide 3 Burr.* 1480. The reason of making this act. 1 *Black. Com.* 255. They must be ambassadors, or public ministers authorized, and received here as such. Their servants must be *bona fide* domestic servants, and the act extends as well to the servants who are natives of the country where the minister resides, as to his foreign servants. 3 *Burr.* 1676. But it is not necessary they should lie in the house. *Barn.* 370. There must be a retainer, an office by name, and an actual service in that office. *Black.* 474. And a secretary of a foreign minister, though not immediately a domestic, is a servant within the statute. *Hopkins v. De Roebuck*, 3 Term Rep. 79. And where a person claims the benefit of the act, as domestic servant to a public minister, he must shew that he really was servant at the time of the arrest, the general nature of his service, the actual performance of it, and that he was not a trader or object of the bankrupt laws. *Vide 2 Str.* 797. 2 *Lord Ray.* 1524. *Fitz-gib.* 200. 1 *Wils.* 20, 78. 1 *Black. Rep.* 48. 1 *Burr.* 401. 3 *Burr.* 1478, 1676, 173. 3 *Wils.* 33. It is the law that gives the protection, and if he be not a *bona fide* servant, such minister shall not take him out of the custody of the law, or screen him from the payment of his just debts. 4 *Burr.* 2016.

Ambassadors and their servants,

Nor is it necessary, to entitle them to the privilege, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office; though unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them. 7 Ann. sect. 5. 1 *Wils.* 20. Although they may on motion be discharged. 3 T. Rep. 79. *Hopkins v. Roebuck.*

Need not be registered.

A consul is not considered as a public minister, and

therefore not entitled to privilege from arrest. *Viveash and another v. Becker*; *Divett v. same*, 3 *Maule and Selw.* 284.

King's servants.

The king's servants are privileged from arrest, if they serve the king in his *household*, (even though they carry on trade, and the debt is contracted in the course of the trade, *King v. Foster and another*, 2 *Taunt*, 167.) for their continual service and attendance upon the royal person of the king is necessary. 2 *Inst.* 631. 1 *Keb.* 3. *Ray.* 152. 8 *Mod.* 12. 5 *Term Rep.* 686. Junior clerk of the *king's kitchen*, discharged out of custody in execution; marshal, warden of the *Fleet*, 1 *Vent.* 65; clerks, attornies, and all other persons attending the courts of justice, 4 *Inst.* 72. 2 *Inst.* 551. 12 *Mod.* 163.; clergymen going to and returning from church, or performing divine service therein, and not merely staying in the church with a fraudulent design, 50 *Edw.* 3. c. 5. 1 *R.* 2. c. 16.; suitors, *Bro. Privil.* 57.

Witness in a suit.

Witness *subpœnaed*, and other persons necessarily attending any court of record upon business, *Sir T. Raym.* 101. 1 *Vent.* 11. *Rules in Chan.* 217; and the party himself, 2 *Black. Rep.* 1113—1142. *Str.* 987, 1094. *Childerston v. Barrett*, 11 *East.* 439.; witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal. 1 *Atk.* 54.

It has been determined that a party attending to give evidence on an award under an order of *nisi prius* made a rule of court, is privileged. 8 *T. R.* 536. 3 *East*, 89.

By 53 *Geo.* 3. c. 17. s. 27. all witnesses summoned by the judge advocate, or person officiating as such, are during their attendance privileged from arrest.

When not allowed.

The privilege the court allows their officers is restrained to those suits only, which they bring in *their own right*; for if they sue or be sued as executors or administrators, they then represent common persons, and are not entitled to privilege. *Hob.* 177. *Dyer* 24. pl. 150. 2 *Sid.* 157. *Latch.* 190. *Godb.* 10.

Seamen and soldiers.

By *stat.* 1 *Geo.* 2. *stat.* 2. c. 14. s. 15. 32 *Geo.* 3. c. 33, s. 22. 44 *Geo.* 3. c. 13. 11 *East.* 25. Seamen and soldiers are privileged from arrest.

Servants of peers.

And though the *servants of peers necessarily employed* about their persons and estates could not formerly be arrested, 2 *Str.* 1065. 1 *Wils.* 278.: yet this privilege seems

to have been taken away by the statute 10 Geo. 3. c. 50. *sect. 2. 2 Black. Com. 155.*

The *sheriff* cannot take notice of the *privilege of attornies*, or other persons attending the courts of justice, 1 *Salk. 1. Co. Litt. 131.*; nor is he bound to discharge them, even upon producing their writs of privilege (except where the arrest was by *process* issuing out of an inferior court, in which case their writ ought to be allowed *instantur.*) 2 *Black. Rep. 1087.* But such persons may obtain an order, if of the same court, to be discharged on common bail. 1 *Mod. 10. 2 Salk. 544. 1 Wilson, 298. Wheeler, an attorney's case.*

Sheriff cannot take notice of privilege of attornies, &c. except where process issues out of an inferior court.

Also if a privileged person be sued jointly with one not privileged, this destroys his privilege: because those with whom he joins are not officers of the court, nor entitled to the privilege which the court grants against its own officers. 2 *Roll. Abr. 274.*

When privilege destroyed.

In case a bankrupt shall be arrested coming to surrender, or after his surrender shall be arrested within 42 days, that then on producing the summons or notice, under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and if detained, such bankrupt shall have for his own use, five pounds for every day he is detained. *Stat. 5 Geo. 2. c. 30. sect. 5.*

A bankrupt privileged for forty-two days.

The bankrupt must, to protect himself from arrest, make an actual surrender, which may be the first public meeting after he has been declared bankrupt, (for before actual surrender, at a public meeting he is not protected,) because the sooner he does it, the better for his creditors. Therefore the court held, that a bankrupt coming from Holland to surrender on the forty-second day, but finding his time enlarged, he did not do so on the 42d day, that the arrest was good. *Kenyon v. Solomon, Cowp. Rep. 156.*

What necessary to protect him.

In an action against husband and wife, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife, 1 *Vent. 49. 1 Mod. 8.*; and if she be arrested, she shall be discharged on common bail. 1 *Term Rep. 486. Edwards v. Rourke & ux.*

Feme covert.

But there are cases in which a feme covert may be arrested. As if the coverture be not open and notorious: or if she has imposed on plaintiff in passing for an unmarried woman. *Black. Rep. 903. Pearson v. Meaden, 1 New Rep. 54. 5 T. R. 194.*

In what cases a feme covert may be arrested.

Bail to the sheriff cannot be held to bail.

If bail enter into a bond for A. conditioned for his appearance at the return of the writ, although the officer pay the money for non-appearance, and the bond be assigned to such officer by the sheriff, such bail cannot be held to bail, for money paid for the performance of the condition of this original bond, entered into by the defendant. And *Lord Kenyon* said, the practice of the other courts was, that a person who has become bail for another, cannot himself be held to bail. The sheriff is to have solvent persons, and it was not necessary he should be armed with this compulsory process, against the bail. *Brander and another v. Robson*, 6 Term Rep. 366.

Bail attending to justify.

Bail attending to justify, are entitled to protection from arrest on mesne process. *Rimmer v. Green*, 1 Maule and Selw. 638. The case of *Meekins v. Smith*, 1 H. B. 636. was recognized by the court, and the rule made absolute, upon an undertaking of the defendant to bring no action.

OF THE AFFIDAVIT TO HOLD TO BAIL.

Of the affidavit, and what it is to contain.

If the action be such as to entitle the plaintiff to require *special bail*, and the plaintiff means to arrest the defendant, or, as it is termed, *hold him to bail*; the first thing to be done, is, for him to make an affidavit of the debt due to him, which, generally speaking, is on oath in writing, wherein the demand should be set forth, clear, certain and correct; positively shewing the nature of the debt claimed, and it should be so certain, that a perjury can be assigned upon it. And the nature of the debt must be shewn, although the circumstances be long and complicated. *Cope v. Cooke*, Dougl. 464.

Construction of the act of 12 Geo. 1. c. 29.

The statute has been construed to require, that the fact of the debt being due, should be stated with certainty, not argumentatively, and by reference to evidence. *Ib.*

Original affidavit not to be amended, or any supplementary affidavit allowed.

In this court, the original affidavit cannot be amended; nor its defects supplied by a supplementary one, *Wheeler v. Copeland*, 5 Term Rep. 552, it being against the practice of the court.

Considered as part of the process.

The affidavit to hold to bail is considered as part of the process to bring the defendant into court; therefore an irregularity in it must be taken advantage of in the first instance, and before special bail is put in, or an appearance is entered, 1 East. 334. *D'Argent v. Vivant*;

and no objection can be made to the insufficiency of an affidavit after the bail have justified. 1 *East*. 81. *Jones v. Price*.

But the cases of assignees, executors, and administrators, are exceptions to a *positive* oath; though they must swear to the defendant's being indebted to the testator, &c. as appears by his book; and that the sum mentioned in the affidavit is then due from the defendant to his estate, as *they believe*, 1 *Term Rep.* 83. And one assignee or executor may make the affidavit. 4 *Term Rep.* 176

Cases of assignees, executors, &c. are excepted.
2 *Str.* 1219.

Two defendants cannot be arrested in separate actions, upon one affidavit.

Two defendants in separate actions.

By rule, *Mich.* 15 *Car.* 2. *It is ordered*, that the *true place of abode*, and the *true addition* of every person who shall make affidavit in court here, shall be inserted in such affidavit.

True place of abode and addition to be inserted.

This rule is strictly adhered to; for where the plaintiff had *only* described himself as *of such a place, without* giving himself any addition of state or degree, the court said, it was important to preserve the settled form of proceedings, and that no affidavit should be received, without such *addition*. *Jarrett v. Dillon*, 1 *East*, 18.

Strictly adhered to.

A foreigner landing here for a temporary purpose, may describe his place of abode to be in his own country, and not at the *place* where the *affidavit sworn*. 3 *East*. 154.

Foreigner.

A clerk may state his place of abode to be at the office where he is employed the greater part of the day, though at night he sleeps at another place. *Haslope v. Thorne*, 1 *Maule and Selwyn*, 103. And *Le Blanc, J.* said, that it had been the constant practice to receive affidavits in this form. *Ib.* 104.

Clerk.

The describing defendant as "of the city of London, merchant," had been held sufficient. *Vaissier v. Alderson*, 3 *Maule and Selwyn*, 165.

Where a defendant had been a few days before discharged out of prison, but by permission still continued to lodge there at night, having no other place of residence, his describing himself *bona fide* in an affidavit to hold to bail as *late* of such a prison, has been deemed sufficient. *Sedley v. White*, 11 *East*. 528. But a defendant who has left one place of residence, and resides

As to the addition of one who had been discharged from prison.

in another, cannot regularly describe himself as *late* of the former. *Id. ib.*

Plaintiff must be competent to swear, and so 3d person.

The plaintiff must be *competent* to swear the affidavit, for if he has been *convicted of felony*, or other infamous crime, the court will discharge the defendant. So if a *third* person make the affidavit. 5 *Mod.* 74. 2 *Salk.* 261. See *Cow. Rep.* 3.

Debt on bond, and case, not to be in one affidavit.

The plaintiff cannot join an action of *debt on bond*, and an action of *assumpsit*, in one affidavit; they are different causes of action, and there is an impropriety in joining them in the *same* affidavit. 5 *Burr.* 2690. *Crooke v. Davis.*

Two separate plaintiffs.

Two *separate* plaintiffs cannot join their debts in one affidavit. 6 *T. R.* 688.

Judges, &c. to grant commissions to take affidavits.

By *stat. 29 Car. 2. c. 5. sect. 1.* the judges, &c. of the courts at Westminster, *by commission*, may empower persons in the several counties of England, to take affidavits concerning matters depending in their several courts.

Affidavits sworn before a commissioner, without stating him to be a commissioner of this court, and not intituled "In the King's Bench," cannot be read. 13 *East.* 189. *The King v. Hare.*

Affidavit may be made before any commissioner or plaintiff's attorney.

Ordered; that all affidavits of any cause of action, before process sued out, to hold defendants to bail, may be sworn before any commissioner authorized to take affidavits in this court; although such commissioner be concerned *as attorney* for the plaintiff, and shall be deemed to be regularly taken. *R. E.* 15 *Geo.* 2.

Or judge, or the officer who issues the writ; see 1s.

And it may be made before any *judge* of the court, or before the *officer*, who issues the writ, or his *deputy*: for which affidavit one shilling is to be paid, and to be filed with such officer. *Ibid. Reg.* 3.

All affidavits taken, made by illiterate persons, must be read and expressed in the *jurat* by the commissioner.

Ordered, that where any affidavit is taken by any commissioner of this court, made by any person, who from his or her *signature* appears to be *illiterate*, the commissioner taking such affidavit shall certify or state in the *jurat* "that the affidavit was read in his presence "to the party making the same, and that such party "seemed perfectly to understand the same;" and also that the said party "wrote his or her signature in the "presence of the commissioner taking the said affidavit." *R. E.* 31 *Geo.* 3. 4 *Term Rep.* 284.—As thus:

" The deponent A. B. was sworn at W. in the county The jurat of
 " of O. this day of , 1817, before me, the such an affi-
 " whole of the affidavit having been first read over by davit.
 " me to the said deponent, A. B. who seemed perfectly
 " to understand the same, and who made his mark in my
 " presence." (Or signed the same in my presence.)

Ordered, that upon every affidavit sworn in court, or If affidavit
 before any judge or commissioner thereof, and made by made by two
 two or more deponents, the names of the several persons or more, names
 making such affidavits shall be written in the *jurat*: and of the several
 that no affidavit be read, or made use of, in any matter written in
 depending in this court, in the *jurat* of which there shall *jurat*.
 be any *interlineation* or *erasure*. R. M. 37 Geo. 3.
 1796. (a)

" The above-named deponents, John Wells and Richard The form of
 " Wells, were sworn at, &c. this day of , 1817, such *jurat*.
 " before me."

It is no good objection, if the commissioner sign A. B. As to the sig-
 commissioner only, without adding, of the Court of nature by the
 King's Bench, if in fact he were a commissioner of that commissioner.
 court. 7 Term Rep. 451. *Kennett v. Jones*. Though
 perhaps it would be better so to do.

Ordered, that affidavits of any cause of action, before Affidavits to
 process is sued out to hold defendants to bail, be not hold to bail
 intituled in any cause, nor read, if filed. R. Trin. Term, are not to be
 37 Geo. 3. 7 Term Rep. 454. The true reason is " that intituled.
 " there is no cause in court." 6 Term Rep. 640. *King v.*
Cole. C. P. hold the same. 1 B. & P. 36. *Hollis v. Bran-*
don. But it is no objection if the affidavit to hold to bail
 be intituled " In the King's Bench." 7 Term Rep. 451.

Formerly an affidavit made abroad out of the king's As to affida-
 dominions, could not be received here. *Rios v. Belifante*. vits made
 2 Str. 1209. for the oath abroad was considered no ground abroad out
 " for the process of this court; see also *Pomp v. Lud-* of the king's
vigson, 2 Burr. 655. S. P. where an affidavit sworn in dominions.
Sweden, and the merchant in London swore with refer-
 ence to the accounts sent to him. But in the case of
Dalmer v. Barnard, 7 Term Rep. 252. an objection was
 taken to an affidavit not being sworn before any person
 authorized to take affidavits in this court, it having been

(a) This rule extends to all affidavits, whether of
 debt, justification of bail, or otherwise.

taken before the high bailiff, and chief magistrate, of the district of Douglas, in the Isle of Man, the court were clearly of opinion, that they could take cognizance of affidavits sworn before foreign judicatures, properly authenticated to them, as this affidavit was, by a deponent here, who deposed "that he had seen" the high bailiff write, and believed the name John Casnaham subscribed at the foot of the paper written, &c. " (being the affidavit) was of the proper hand-writing of " said J. C." That it was the constant practice for the judges here to receive affidavits sworn before the judges in *Scotland* and *Ireland*.

Affidavits made before a foreign magistrate.

And it was decided, that an affidavit of debt made in a foreign country before a magistrate, whose authority in that country to take affidavits, and administer oaths, is verified by a proper affidavit here, is sufficient foundation for a judge's order to hold the defendant to special bail. 8 *East*, 364. *Omealy v. Newell*.

Such affidavit if received must have all the requisites.

But it has been held, that such affidavits ought to contain all those requisites that are essential in an affidavit made in England, "to hold to bail," as not having made a tender of the money in bank notes. 7 *Term Rep.* 376. in notes c. *Nesbitt v. Pym*.

No person to be held to special bail, unless affidavit be made that there had been no offer to pay in notes of the bank. * Of the bank of England.

By *stat.* 37 *Geo.* 3. c. 91. No person shall be held to special bail, upon any process issuing out of any court, unless the *affidavit*, which shall be made for that purpose according to the provisions in the act of 12 *Geo.* 1. "for preventing frivolous and vexatious arrests," shall not only contain the several matters required by the said act, but also "that no offer has been made to pay the "sum of money in such affidavit mentioned, and therein "sworn to, for the purpose of holding any person to "special bail, in notes of the said governors and company ^a expressed to be payable on demand (fractional parts of the sum of 20s. only excepted.)" *Sect.* 8.

Under this act of parliament, many applications have been made, to discharge the defendant on account of the defect in the affidavit, as where the debt has amounted to a fractional part, or 1190l. 11s. 3d. in not negating the tender to pay the 1190l. *only*, in bank of England notes; but stating that *no tender or offer* has been made to pay the *said sum*. *Jennings v. Mitchell*, 1 *East*, 17. So where the affidavit stated 16l. and upwards, for which said sum of 16l. and upwards, he had not been tendered, &c. *Ford v. Lover*, 3 *East*, 41. So with respect to an assignee of a bankrupt, it is necessary to

negative the tender to the bankrupt, as well as himself. *Martins v. Renoe*, 8 Term Rep. 455. or he will be discharged.

But where the affidavit was for 20l. *and upwards*, 20l. and upwards, it is sufficient to negative a tender of the said sum in bank notes, that having reference to the *specific sum sworn to*, which was such as might be so tendered. *Malin v. Townsend*, 2 East. 1.

Under this act it hath also been held, that a *clerk* in the chamberlain's office of London may make an affidavit of a debt due to the mayor, &c. of London, concluding in the usual form, with negating a tender of the debt in bank notes, to the best of his knowledge and belief, as the chamberlain himself could not have sworn in any different manner, or with more certainty than the clerk, and the rule for common bail was discharged. *The Mayor of London v. Dias*, 1 East, 237.

Agents may make affidavits.

And where the *clerk* and *agent* of the plaintiff (whose usual place of residence was near Kidderminster) stated in *express* terms, that the defendant was indebted to the plaintiff in 210l. for timber sold by him to defendant, and that the defendant made no tender in bank notes, &c. to the plaintiff or to the deponent, as his clerk and agent, the court held, the affidavit to be good, and said, they could not tell *what means* the *agent* may have for satisfying himself of *the fact*; it is enough for this purpose, if he take upon him to *swear positively* to it. *Knight v. Keyte*, 1 East, 415. It was stated by counsel that the *principal* was *abroad* at the time, and business conducted by the deponent, which I think was the case.

Clerk and agent stating in express terms that defendant was indebted, and negating the tender.

But where the agent deposed that no offer had been made to pay the sum or any part thereof in bank notes, to the best of his knowledge and belief, and the plaintiff living in England, the court discharged the defendant on common bail. 2 East, 24. *Elliot v. Duggan*, See S. P. 8 Term Rep. 520. *Cass v. Levy*.

But where agent deposed that no tender made to his knowledge.

- If the plaintiff be *abroad*, and the *agent* makes the affidavit of the debt, it will be sufficient for him to negative the tender of the debt in bank notes, "as the agent believes." *Munro v. Spinks*, 8 Term Rep. 284.

If plaintiff be abroad, and agent swear.

But now, *by stat.* 43 Geo. 3. c. 18. sect. 2. In case any application be made to any of his majesty's courts in Westminster, by any person, who shall be held to *special bail*, under process, to be discharged upon common bail by reason of any defect in such part of the affidavit

In case any person makes application to the court to be discharged on common

bail, by reason of any defect in affidavit as negatives the tender, he shall not be discharged, unless, &c.

on which he is so held to bail, as negatives, or is intended to negative any offer having been made to pay the sum in such affidavit mentioned, in notes of the bank of England; the person making such application, shall not be entitled to such discharge, "unless he shall at same time make proof by affidavit, that the whole sum for which he has been so held to bail, had been, or was, before such holding to bail, offered to be paid either wholly in such notes, or partly in such notes, and partly in money."

No counter-affidavit to be received.

No *counter affidavit* can be received in this court, in order to contradict or do away the effect of an affidavit to hold to bail on the merits. *Imlay v. Elefsen*, 2 East, 453.

If defendant be holden to bail under a judge's order.

If a defendant be holden to bail under a judge's order upon an affidavit disclosing circumstances which shew that the plaintiff has been *damnified* to such an amount, it is sufficient; though it improperly state, that the defendant *was indebted* to that amount, and disclose the special circumstances. *Ibid*.

A co-assignee may on his own affidavit, sue in the original creditor's name.

A co-assignee of a debt arising out of bills of exchange in his own possession, may sue in the name of the original creditor, and hold the defendant to bail, on his own affidavit, swearing *positively* as to *all* the facts required which are within his *own knowledge*, and to the best of his knowledge and belief, as to such as are within the knowledge of his principal and co-assignees. *Cresswell v. Lovell & al.* Term Rep. 418.

Affidavit for bail for stipulated damages.

An affidavit to hold to bail for *stipulated* damages for the "non-performance of an agreement," must state a *breach* of the agreement. *Stinton v. Hughes*, 6 Term Rep. 13.

Affidavit for money had and received.

It is sufficient to state, that the defendant was indebted to the plaintiff in such a sum of money, "for money had and received on account of the plaintiff," without adding "received by the defendant." *Powell v. Porthersch*, 8 Term Rep. 338.

Court will not receive a supplemental affidavit.

Plaintiff must stand or fall by affidavit.

Where there is a good cause of action, and a *proper affidavit*, the defendant may be held to bail, and the court will not go out of the affidavit, or prejudge the cause, by entering into the merits upon which it is founded, 1 *Salk*. 100. The plaintiff, therefore, must stand or fall by his affidavit; it being the constant and uniform practice, "not to receive a supplemental or *explanatory* affidavit" on the part of the plaintiff in this court, nor a *counter or contradictory* one, on the part of the defendant, *Heathcote v. Gosling*, 2 Str. 1157. 1 *Wils.* 325. *Emerson v. Haw-*

kins, 5 Term Rep. 552. *Jacks v. Pemberton*. Dougl. 467.
Cope v. Cooke.

A plaintiff who sues for penalties under the lottery act, 27 Geo. 3. c. 1. s. 2. must make an affidavit previous to the suing out of the writ, specifying the amount of the penalties sued for, and that amount must be specified in the first process issued, viz. the bill of Middlesex, or latitat, and whether the defendant be held to bail or not. *King qui tam v. Horne*, 4 Term Rep. 349.

Affidavit to be made previous to the action brought on 27 Geo. 3. c. 1.

The act is, that upon every suit, action, bill, &c. a capias, or other writ, shall and may issue: the first process specifying therein the amount of the penalties sued for, whereof an affidavit shall be first made and filed.

There is no distinction in the act between bailable writs, and those that are not so.

In what Cases the Affidavit is not sufficient, besides those stated.

If the affidavit be, that the defendant borrowed 2000l. of plaintiff on bottomry, which money is now due and owing to plaintiff by virtue of the said bond, as thereby may appear, it is not sufficient, for the money may be paid and not appear. *Str.* 1157. *Heathcote v. Gosling*.

Affidavit as appears on bond, not good.

The plaintiff made oath of his debt before a burgo-master in *Holland*, who certified an account thereof to the plaintiff's agent here, who makes an affidavit that he believes the said oath and account current are true, and defendant was held to bail; common bail was ordered: for a positive affidavit is always required, and affidavits going only to belief, are insufficient. *Van Morsell v. Julian*, 1 Wils. 231. S. P. 2 *Str.* 1209. *Rios v. Bellifonte*.

The affidavit must be positive to hold to bail.

That the defendant was indebted to him in such a sum "as appears by agreement bearing date such a day." Common bail ordered. *Jennings v. Martin*, 3 Burr. 1447. For the affidavit is only couched in terms of reference. *Vide* 1 Burr. 655. *Pomp v. Ludvigson*, the like resolution.

As appears by agreement.

That defendant is indebted to plaintiff "in 20l. according to the bill delivered by the plaintiff to the defendant," is insufficient. *Williams v. Jackson*, 3 Term Rep. 575.

According to bill delivered.

An affidavit to hold to bail, stating that the defendant was indebted to plaintiffs in so much for interest money,

For interest money by virtue of agreement.

under and by virtue of an agreement, is not sufficient. 10 *East*. 358. .

Only one defendant to be put in one affidavit in a separate action.

It appeared that the defendant and *two* others, had been held to bail in *separate* actions, upon *one* affidavit.—The defendant was named *second* in the affidavit. Motion to set aside the proceedings for irregularity. *Lord Mansfield*. The judges of the court of C. B. and the barons of the Exchequer have been consulted, and they all agree, “that they never knew of its being the practice in their courts, that more than one defendant should be inserted in the “same affidavit.” If in fact such a practice has prevailed, it has been *without* their sanction or knowledge. They all disapprove of it, and consider it as contrary to the meaning of the act, 12 *Geo.* 1. c. 29. and a fraud upon the stamp duties. *Gilby v. Lockyer*, *Doug.* 217.

Only the defendant or defendants in one action, can be included in a bailable writ.

There were *four* separate affidavits against four several defendants, for separate offences against the lottery act. The original writ included *all*, though the *ac etiam* part was several against each; and a separate *alias capias* was sued out against each. Rule to set aside proceedings—Rule discharged. But the court were misled, and afterwards on conference with all the judges, it was their opinion, that a plaintiff could not join distinct defendants for distinct demands, either in the *same* writ, or in the *same* affidavit, and the above case of *Gilby* and *Lockyer* ought to regulate the practice in future. 4 *Term Rep.* 697. *Holland v. Johnson*.

By a third person.

Affidavit by a third person, that defendant is indebted to plaintiff, as appears by account, or by bill or indorsement, or bond, under defendant's hand, not sufficient. 1 *Wils.* 121. 279. *Rollins v. Mills*.

On agreement to pay balance, the affidavit should specify the balance due, and not hold to bail for the whole sum.

That defendant was indebted in 4720l. and upwards, under and by virtue of a certain agreement in writing, bearing date, &c. entered into between deponent and defendant, whereby the defendant undertook and engaged, that he, together with *A.* and *B.* should pay or discharge on or before, &c. the *balance* of all subsisting accounts between them, which said balance is still due and unpaid to deponent. *Cur.* The plaintiff should have shewn what the balance was, and have sworn, that, that was still due and unpaid; whereas, he has sworn to the *whole* sum, which was inserted as a penalty for securing the balance: An affidavit to hold to bail must be positive and certain, and not merely argumentative. *Hatfield v. Lingard*, 6 *Term Rep.* 217.

But an affidavit stating that defendant is indebted to plaintiff in 10l. as he computes it, was held to be sufficient. 2 Burr. 1032. *Moulby v. Richardson*. In 10l. as he computes it.

On an affidavit that the defendant is indebted to the plaintiff *Rollin* in a certain bailable sum of money, by virtue of a bill of exchange, indorsed by the payee for the plaintiff, "as appears by the said bill and indorsement," and that *Mills*, the defendant, accepted the bill, but had refused payment, that the bill was protested, and, though the affidavit was positive that the defendant had accepted the bill, court ordered common bail, because the affidavit only states that the defendant is indebted as appears by the said bill. *Rollin v. Mills*, 1 Wils. 279. As appears by the bill, not good.

So affidavit made by plaintiff's book-keeper, that he was indebted in 3400l. "as deponent verily believes," is insufficient. *Str.* 1226. *Claphamson v. Bowman*. Book-keeper.

An affidavit to hold to bail on the lottery act, 27 Geo. 3. c. 1. should specify the nature of the offence, and aver that the defendant has incurred the forfeiture: but the offence need not be described circumstantially; nor is the plaintiff obliged to swear that the defendant is indebted to him to the amount of the penalty, because any other informer might previously have commenced the action. *Davis v. Mazzinghi*, 1 Term Rep. 705. On lottery-act, should specify nature of the offence.

If the action be founded on an act of parliament, and that be misrecited in the affidavit, it will be bad; as calling it an act passed in the 27 Geo. 3, when it passed in the 22 Geo. 3. But the party is not bound to set forth the year at all when the act passed. 2 Term Rep. 654. *Walson v. Shaw*. If act be misrecited.

The affirmation of plaintiff alleged, that the defendant was indebted to him in 5000l. "for so much money had and received of this affirmant, and for which he has not accounted." The court held, that the last words, rendered it not positive. *Champion v. Gilbert*, 4 Burr. 2126. The affidavit must be as strong and positive as an affidavit to change the venue. The case of assignees, &c. are exceptions. *Per Builer J. Mackenzie v. Mackenzie*, 1 Term Rep. 716. Affidavit to hold to bail must be positive. Assignees, &c. excepted.

On an affidavit that the maker and indorser of a promissory note are indebted to the holder, neither can be held to bail. *Hussey v. Wilson*, 5 Term Rep. 254. Maker and indorser in one affidavit.

A defendant being held to bail, on an affidavit of a debt due from three defendants, as surviving partners of another deceased, was discharged, on filing common bail, the de- Affidavit due from three, declaration

due from three alone. clarification being "for a debt due from the three defendants alone." *Spalding v. Mure and others*, 6 Term Rep. 363.

If affidavit be argumentative only. Nor if it state, that on such a day the plaintiff gave defendant notice to *quit on*, &c. and that the latter held over notwithstanding, by reason of which, and by force of the statute, an action had accrued to plaintiff to recover from defendant 108l. &c. *Per Curiam*;—The affidavit does not state *positively* defendant is indebted in so much, it is only argumentative. *Wheeler v. Copeland*, 5 Term Rep. 364.

An affidavit stating that the defendant "was indebted to the plaintiff in 54l. for goods sold and delivered." without stating by the plaintiff to the defendant, is insufficient. 7 East, 194. 8 East, 106.

As appears by master's allocatur. An affidavit to hold to bail, that defendant is indebted to the plaintiff in a certain sum, "as appears by the master's allocatur," is not sufficiently positive, because he should have sworn, "the debt is still due." *Powell v. Porthorch*, 2 Term Rep. 55.

Indebted in, &c. and for which defendant promised to be accountable, insufficient. That defendants are indebted to plaintiff 245l. 5s. for money lent by plaintiff to defendants, for the use of another, and for which defendants promised to be accountable, and to repay or cause to be paid, or secured to plaintiff in three days from the day of plaintiff's so advancing and lending the same. This affidavit is defective. *Jacks v. Pemberton*, 5 Term Rep. 555.

If affidavits state two sums to be due to two separate plaintiffs bad. If an affidavit to hold to bail state *two* sums to be due from the defendant, to *two separate* plaintiffs, though only *one writ* be sued out, the court will set aside the proceedings on that *one writ*. *Dean and Chap. of Exeter v. Seagell*, 6 Term Rep. 688.

As to Affidavits made by the Plaintiff as Assignee, Executor, &c.

Assignee of bond. When an assignee of a bond swore, that the obligor was indebted in 90l. for principal and interest, as he believed, this was held sufficient. *Loveland and Bassett*, 1 Wils. 232.

Executor. If an executor swears to the books of the testator, and that he believes them to contain a true account, and that the debt is still unpaid, it is sufficient to hold to special bail. But an affidavit by an executrix, that the defendant was indebted to her testator (so much) "as appears

"by the books of her testator," was held insufficient. *Str.* 1219. *Waldron v. Fransham.*

In the case of *Seldon, executor, v. Baker*, 1 T. R. An executor, 48. Mr. J. Buller said, The general rule is, that there must be a *positive affidavit*: the cases of *assignees, ex-ecutors, &c.* are by way of exception to that rule; then a party claiming under that exception, must shew a case where it has been allowed. In those cases, if he swears that "*he believes it to be true*," this is as much as he can do, because the transaction in general does not come within his own knowledge. But there is no case where the affidavit has been allowed to be sufficient to hold the defendant to special bail, without adding *the belief of the party who made it*. The affidavit was, "indebted to him as executor for money had and received by defendant, as receiver of the rents, and as appears to deponent to be the true balance upon the stewardship account by him delivered to this deponent, and from these several articles of disbursement therein contained." He ought to have said, that he believed the account to be true; therefore held insufficient. &c. in his affidavit must swear as to his belief, to hold to bail.

If assignees of a bankrupt swear that the defendant is indebted, "as appears to them by the last examination of the bankrupt, as they believe, and that they have not received the debt or any part of it, and that they believe it to be still due," it is sufficient. 4 Burr. 1992. *Barclay, assign. v. Hunt.* Assignees of a bankrupt.

If there be two or more assignees of a bankrupt, and one only make the affidavit of the debt being due, it will be sufficient, for the consequence of not allowing it to be good, would be to prevent the assignee arresting defendant at all, unless the other would assist him. *Swayne al. v. Crammond*, 4 Term Rep. 176. An affidavit of debt by one assignee of bankrupt, sufficient.

An affidavit on the lottery-act, 22 Geo. 3. c. 47. alleged that defendant had promised and agreed to pay to several persons by name, divers sums of money, on certain events and contingencies, relating or applicable to the drawing of certain tickets or numbers, &c. without adding, that defendant "had taken and received any money in consideration of such promises," was held good. *Holland qui tam v. Bothman*, 4 T. R. 228. Lottery act.

Where the Court have staid the Proceedings on the Lottery Act for Want of Affidavit.

Where several have separately incurred penalties for printing illegal schemes of the lottery, a separate affidavit must be made and filed against each of them, and if they be all joined in one affidavit, the irregularity is not waived by putting in bail; but the court will stay proceedings against all.

As an affidavit hath been held necessary to be made previous to the issuing of a writ for penalties under 27 Geo. 3. c. 1. sect. 2. and specifying the amount of those penalties, in consequence many actions were brought, and the present plaintiff filed *one* affidavit in order to hold the four defendants to bail, and after sued *one* writ against *all*, but *declared separately*, as for *separate* offences. Defendants put in bail. A rule was obtained, "why" "the writ should not be quashed," because the *affidavit*, which is the *first* step to be taken under the 27 Geo. 3. c. 1. sect. 2. and without which the writ cannot be sued out, cannot be supported. The objection was, that each defendant was obliged to take a copy of the *whole* affidavit, whereas three-fourths of it do not relate to him; and that the office copy was necessarily stamped with *four stamps*, when *one* would have been sufficient, if the affidavit had affected only *one* defendant. *Per Cur.* This case comes within the above statute, which speaks of such penalties against certain former acts, as touch and concern lotteries. If so, it was necessary that there should be an affidavit previous to the suing out of the writ. This affidavit cannot be supported for the reasons urged by the defendant's counsel; they are not to be harrassed with the unnecessary expence of taking copies of those parts of the affidavits which relate to offences not imputed to them individually. From this, it necessarily follows, that the writ must be quashed, because the words of the act are *positive*, that no process shall be sued out until an affidavit has been first made and filed. And though in ordinary cases, a party may waive taking advantage of any trifling irregularity in the mode of proceeding, by not objecting in the *first* instance; the defendants in this case could not waive this objection, because the court are to take care that an action on a penal statute shall not be commenced in a mode prohibited by that statute. *Rule abs. Goodwin qui tam v. Parry, 4 Term Rep. 577.* It was stated in the shewing cause, that defendants had *waived* taking advantage of it, by *putting in bail*.

Affidavit on lottery act must not be intituled.

An affidavit to hold to bail under the lottery act, must *not be intituled*; because there is no cause in court. *King q. t. v. Cole, 6 Term Rep. 640.* see rule, *Trin. 38 Geo. 3. 7 Term Rep. 454.* by which it is ordered "that affidavits of any cause of action before process sued out to

"hold defendants to bail, be not intituled in any cause,
"nor read, if filed."

When Persons cannot object to the Insufficiency of Affidavit.

If defendant *voluntarily* give a bail-bond, he cannot *Voluntarily afterwards* object to the insufficiency of the affidavit to giving bail hold to bail. *Norton v. Danvers*, 7 Term Rep. 375.

Nor after *plea pleaded*. *Levy v. Duponte*, Ibid. 376, n. Nor after plea.

Nor after notice of executing a *writ of inquiry*, on a judgment by default. *Desborough v. Copinger*, 8 Term Rep. 77. Nor after a notice of inquiry.

Nor after *perfecting bail* above. See 1 B. & P. 132. C. P. Nor after perfecting bail.

The affidavit of the debt must be filed *before* or *at the time* of the issuing out the writ, or the court will discharge the party from the arrest, on filing common bail. Must be filed before, or at time of issuing writ.

THE FORMS OF AFFIDAVITS.

In the King's Bench.(a)

A. B. of maketh oath and saith, that C. D. is justly indebted unto this deponent, in the sum of 20l. for money lent and advanced by this deponent to the said C. D. and at his request; and this deponent further saith, that no tender or offer hath been made to this deponent to pay him the said sum of 20l. or any part thereof, in any note or notes of the governor and company of the bank of England, expressed to be payable on demand. For money lent and advanced. No tender.

Supposing the affidavit be made that the defendant is indebted to the plaintiff in 20l. 14s. 6d. then the affidavit should be thus:

In 20l. 14s. 6d. for money lent and advanced by this deponent to the said C. D. and at his request, "And this deponent further saith, that no tender or offer hath If plaintiff swears to 20l. 14s. 6d. or a fractional part.

(a) An affidavit not intituled in any court, but only with the words "by the court," written at the bottom of the jurat is not sufficient. *Molling v. Poland*, 3 Maule and Selwyn, 157. *Rex v. Hare*, 13 East. 189.

“ been made to this deponent to pay him the sum of 20l.
 “ 14s. 6d. or any part thereof, (fractional parts of a
 “ pound excepted) in any note or notes of the gover-
 “ nor and company of the bank of England, express-
 “ ed to be payable on demand.”

For money
 laid out.

For money by this deponent, paid, laid out, and ex-
 pended for the said C. D. at his request; and this de-
 ponent further saith, &c. as in the first affidavit.

Money had
 and received.

For money had and received by the said C. D. to and
 for the use of this deponent; and, &c.

Money lent,
 paid, had, and
 received.

For money lent and advanced, and paid, laid out and
 expended by this deponent, to and for the use of the said
 C. D. and at his request; and for other money by the said
 C. D. had and received, to and for the use of this de-
 ponent; and, &c.

On an account
 stated.

For so much money due and owing from the said C.
 D. to this deponent upon the balance of an account
 stated and settled between this deponent, and the said
 C. D.; and, &c.

Quaker's af-
 firmation.

In case the plaintiff be a *Quaker*, his *affirmation* must
 be drawn as follows :

A. B. of _____, being one of the
 people called Quakers, solemnly affirms, that C. D. is
 justly indebted unto this affirmant in the sum of 50l.
 for money lent and advanced by this affirmant to the said C.
 D. at his request: and this affirmant further affirms,
 that no offer has been made to this affirmant, to pay to
 him the said sum of 50l. or any part thereof, in any
 note or notes of the governor and company of the bank
 of England, expressed to be payable on demand.

Affidavit by a
 wife or ser-
 vant.

E. B. (a) the wife of A. B. of _____ &c.
 maketh oath, and saith, that C. D. is justly indebted
 to the said A. B. in the sum of 30l. for money lent and
 advanced by the said A. B. to the said C. D. at his
 request: and this deponent further saith, that no tender
 or offer hath been made to the said C. D. to pay him
 the said sum of 30l. or any part thereof, in any note or
 notes of the governor and company of the bank of
 England, expressed to be payable on demand.

(a) E. F. of Fleet-street, London, servant to John
 Doe, of Fleet-street, London, mercer, maketh oath, &c.

A married woman made affidavit that defendant was *Feme covert*, indebted for rent of lodgings, and for money lent by her to the defendant, and it was held sufficient. *Tidd. 6 Ed. 187. Per Cur. Trin. 40 Geo. 3.*

For work and labour done and performed by this deponent, for the said C. D. and at his request: and, &c. *For work and labour.*

For work and labour done and performed, and materials found and provided, used and applied by this deponent, in and about such work and labour, for the said C. D. and at his request: and, &c. *(a)* *Ditto and materials.*

For work and labour done and performed by this deponent *and his servants*, and with his *horses, carts and carriages*, for the said C. D., and at his request: and, &c. *For work done by plaintiff and his servants, horses, &c.*

For work and labour done and performed by this deponent and his servants, for the said C. D. and at his request: and, &c. *For work done by plaintiff and his servants.*

For wages due and payable from the said C. D. for the service of this deponent done and performed, as the hired servant of the said C. D. and on his retainer: and, &c. *For wages.*

For goods sold and delivered by this deponent to the said C. D. *(b)* and at his request: and, &c. *Goods sold and delivered.*

For a horse sold and delivered to the said C. D. and at his request: and, &c. *Horse.*

For goods bargained and sold by this deponent to the said C. D. and by virtue of that bargain and sale *For goods bargained and sold, and delivered to a third person.*

(a) On an affidavit stating that defendant, captain of a ship, was indebted to plaintiff, for work and labour of plaintiff, done on board the ship, and for materials found by plaintiff, and used thereon, and for goods sold and delivered, and money paid by plaintiff at the request of the defendant, was held to be defective, in not stating that the work or money was done or paid for, or the goods sold to defendant. *Young v. Gattien, 2 Maule and Selw. 603.*

(b) It is necessary to state that the goods were sold and delivered by the plaintiff to the defendant. *7 East. 194. 11 East. 315.*

delivered (a) to one E. F. at the request of the said C. D. : and, &c.

For the hire of horses. For the use and hire of divers horses, mares, and geldings of this deponent, by him this deponent let to hire, and delivered by this deponent to the said C. D. and at his request : and, &c.

For work done as a surgeon, and for medicines. For the work and labour of this deponent as a surgeon, by him done and performed in and about the healing and curing of the said C. D. of divers wounds, at his request, and also for divers medicines, potions, and plaisters, by this deponent found and provided, delivered and applied by this deponent on those occasions for the said C. D. at his request : and, &c.

For medicines found as an apothecary. For divers medicines, and other necessary things, found and provided, administered, delivered and applied by this deponent as an apothecary, for the said C. D. and divers other persons (b) at his request : and, &c.

For arrears of rent due on a lease. For certain arrears of rent due and owing from the said C. D. to this deponent, for the use and occupation of a certain messuage or tenement, with the appurtenances of this deponent, demised by this deponent by indenture of lease to the said C. D. : and, &c.

For a gelding sold. For gelding sold and delivered by this deponent to the said C. D. and at his request : and, &c.

For meat, drink, washing, &c. For meat, drink, washing, lodging, and other necessities, by this deponent found and provided for him the said C. D. and his family, at his request : and, &c.

To hold an administrator to bail on a devastavit returned by the sheriff. A. B. of, &c. maketh oath and saith, that C. D. is indebted unto this deponent in the sum of 20l. by virtue of a certain judgment by default recovered by him against the said C. D. as the administrator of J. K. deceased in last past : and to a writ of *fieri facias*, upon which said judgment the sheriff of Middlesex hath returned *nulla bona* and a devastavit by the said C. D. of the effects of the said J. K. deceased, to the amount of the said 20l. Vide *Comb.* 206.

(a) It is insufficient to state that the goods were bargained and sold, without adding that they were delivered. 12 *East*, 398.

(b) If that be the case ; if not, leave it out.

For the agisting, depasturing, and keeping of divers cattle by this deponent for the said C. D. and at his request: and, &c. For the agistment of cattle.

For horse-meat, stabling, care, and attendance, found, provided, and bestowed, by this deponent, for, in, and about the feeding and keeping of divers horses, mares and geldings, for the said C. D. and at his request: and, &c. For the keeping of horses.

For freight, primage, and average, due and payable from the said C. D. to this deponent, upon, and for, and in respect of certain goods, carried and conveyed by this deponent, in and on board a certain ship or vessel, for the said C. D. and at his request: and, &c. For freight.

For the use and occupation of a certain dwelling house, with the appurtenances of this deponent, held and enjoyed by the said C. D. as tenant thereof, to this deponent, for one year now elapsed: and, &c. For the use and occupation of a house.

For the use and occupation of divers rooms and apartments, in and parcel of a certain dwelling house of this deponent, held and enjoyed by the said C. D. as tenant thereof, to this deponent for half a year now elapsed: and, &c. The like for rooms.

For the work and labour, care, diligence, and attendance, done, performed, and bestowed, by this deponent, as the attorney and solicitor of and for the said C. D. and on his retainer, in and about the prosecuting, and defending, of divers causes, suits, and businesses, for the said C. D. and for certain fees due, and of right payable to this deponent, in respect thereof, and for money laid out, expended, and paid for the said C. D. by this deponent, and at his request: and, &c. For an attorney's bill.

For the work and labour, care, diligence, and attendance, done, performed, and bestowed, by this deponent, in and about the drawing, writing, and engrossing, of divers deeds, and writings, for the said C. D. and in and about other the business of the said C. D. and at his request: and, &c. For conveying, &c.

A. R. of &c. baker, maketh oath and saith, that C. D. is justly indebted to this deponent, and unto E. F. this deponent's partner, in the sum of 20l. for goods sold and delivered to the said C. D. by this deponent and his said partner, at his request: and, &c. By one partner for goods sold and delivered.

For goods sold and delivered by this deponent and one E. F. his late partner deceased, and whom this partner. By a surviving partner.

deponent hath survived, to the said C. D. and at his request: and, &c.

Negating a tender on an affidavit made by one or two partners.

And this deponent further saith, that no offer hath been made by the said C. D. to pay to this deponent the said 20l. or any part thereof, in any note or notes of the governor and company of the bank of England, expressed to be payable on demand, nor hath the said C. D. to the knowledge or belief of this deponent, offered to pay to the said E. F. this deponent's said partner, the said 20l. or any part thereof in any note or notes of the governor and company of the bank of England, expressed to be payable on demand.

On Notes of Hand.

Drawee against the drawer.

A. B. of, &c. maketh oath and saith that C. D. is justly indebted unto this deponent in 50l. on a promissory note drawn by the said C. D. payable to this deponent, or order, (a) at a day now past: and, &c.

Indorsee against drawer.

On a promissory note, drawn by the said C. D. payable to one A. B. or order, at a day now past, and by him indorsed to this deponent: and, &c.

Indorsee against the indorser.

Is justly indebted unto this deponent in 50l. as indorsee of a promissory note of hand indorsed to this deponent by the said C. D. and payable at a day now past: And, &c.

On a note where part has been paid, drawee against drawer.
Quaker's affirmation.

Is justly indebted unto this deponent in 50l. upon a promissory note drawn by the said C. D. payable to this deponent, or order, for 100l. at a day now past: And, &c.

A. B. of, &c. (being one of the people called *Quakers*.) solemnly affirms, that C. D. is justly indebted unto this affirmant in 20l. on a promissory note, drawn by the said C. D. payable to this affirmant, or order, at a day now past: and, &c.

(a) (*Or on demand*) See a case in C. P. where an affidavit stated the defendant to be indebted as indorsee of a bill of exchange, "without alledging the bill to have become due;" the court held it to be sufficient. *Davison v. March*, 1 New Rep. 157.

ON BILLS OF EXCHANGE.

A. B. of, &c. grocer, maketh oath and saith, That C. D. is indebted to this deponent in 70l. on a bill of exchange, drawn by one E. F. and accepted by the said C. D. payable to this deponent, or order, at a day now past: (a) and, &c. Drawee against acceptor.

Saith, That *John Denn* is justly indebted to this deponent in 100l. on a bill of exchange, drawn by the said *John Denn*, upon one E. F. and payable to this deponent or order, at a day now past: and, &c. Drawee against drawer.

Maketh oath and saith, That C. D. is justly indebted to this deponent in 70l. on a bill of exchange, drawn by the said C. D. on one J. K. payable to his own order, at a day now past, and by the said C. D. indorsed to this deponent: and, &c. Indorsee against the drawer when payable to his own order.

That C. D. is justly indebted to this deponent in 70l. as indorsee of a bill of exchange, indorsed by the said C. D. to this deponent, and payable at a day now past: and, &c. Indorsee against an indorser.

IN TROVER. (b)

A. B. of, &c. mercer, maketh oath and saith, that In trover for goods.

(a) It must appear that the bill was due. *Holcombe v. Lambkin*, 2 *Maule and Selw.* 475.

(b) By rule, *Hil.* 48 *Geo.* 3. Ordered that no person be held to special bail in an action of trover or detinue, without an order made for that purpose by the lord chief justice, or one of the judges of this court. 9 *East.* 325. An affidavit to hold to bail under a judge's order in trover by the assignees of a bankrupt, which stated "that defendant possessed himself of the goods, and has refused to deliver them, and has converted them to his own use, as appears by the books of account of the bankrupt, and by letters of S. (the agent) and letters of plaintiffs, as the defendant believes," was holden not to be sufficiently certain to shew a conversion; and therefore, the court discharged the defendant on common bail. A supplemental affidavit cannot be used to cure the defect in the affidavit; but the party must apply for a new order. *Molling and others, assignees of White and others, bankrupts, v. Buckholtz*, 2 *Maule and Selw.* 563.

Richard Roe hath possessed himself of divers goods and chattels of this deponent, of the value of 100l. which he hath refused to deliver to this deponent, and hath converted the same to his own use.

Trover for a promissory note.

That C. D. hath possessed himself of a certain promissory note of hand of this deponent's, bearing date the day of , 18 , whereby one A. B. six weeks after the date thereof, promised to pay to this deponent, or order, 40l. for value received; and which said note is still unpaid, and the said C. D. hath refused to deliver the said note to this deponent, and hath converted the same to his own use.

The like for a bond.

That C. D. hath possessed himself of a certain bond or obligation of this deponent's, bearing date the day of , 18 , entered into by one J. K. to this deponent in the penal sum of 400l. conditioned for the payment of 200l. and interest as therein mentioned; and which said bond or obligation is still wholly unsatisfied; and the said C. D. hath refused to deliver the said bond or obligation to this deponent, and hath converted the same to his own use.

The like for deeds generally.

That C. D. hath possessed himself of divers deeds and writings of this deponent, of the value of 400l. and which deeds and writings the said C. D. hath refused to deliver to this deponent, and hath converted the same to his own use.

In detinue.

That C. D. hath in his possession, and unjustly detains from this deponent, a certain indenture of lease, bearing date the day of 18 , made between C. D. of, &c. of the one part, and this deponent of the other part, and which said indenture is of the value of l. to this deponent, who hath demanded the same.

What affidavit is sufficient.

An affidavit in trover, "That the defendants have possessed themselves of divers goods belonging to the plaintiff of the value of 20l. and have refused to deliver them up; and that they, or some of them, have converted and disposed of them to their own use," is sufficient to hold to bail. *Cowp. Rep. 529. Charter v. Jacques.*

On an affidavit in trover, not specifying any cause of action, or that the goods

Affidavit stated "that the plaintiff's cause of action against the defendant, was, for converting and disposing of divers goods of the plaintiff, of the value of 250l. which he refused to deliver, though the plaintiff had demanded the same; and that neither the defendant,

"or any person on his behalf, had offered to pay the plaintiff the 250l. or the value of the goods." Rule why defendant should not be discharged out of custody, and why bail-bond should not be delivered up to be cancelled.—The objections were, that the affidavit did not state, that defendant ever had possession of the goods, or that he had ever converted them, or that plaintiff had any cause of action against the defendant. Court said, that the affidavit was not in the usual form, and did not positively state any cause of action; and though it stated the defendant refused to deliver up the goods, it did not appear they were ever in his possession. *Rule abs. Wooley v. Thomas, 7 Term Rep. 550.*

were in the defendant's possession, held bad.

In trover for a bill of exchange, it should be stated, "that the bill remains unpaid." *7 Term Rep. 321. Clarke v. Cawthorne.*

Trover for a bill of exchange.

An affidavit stating, "that the defendant was indebted to the plaintiff in 23l. and upwards, in trover," is bad. *Hubbard v. Pachew, 1 H. Bl. 218.*

Affidavit stating indebted in trover bad.

ON BOND.

J. K. of, &c. hosier, maketh oath and saith, That C. D. is justly indebted unto this deponent in 110l. for principal and interest due on a bond, bearing date the day of and made and entered into by the said C. D. to this deponent, in the penal sum of 200l. conditioned for the payment of 100l. and lawful interest for the same, at a day now past. (a) And, &c.

On a bond.

J. D. of, &c. gentleman, maketh oath and saith, that C. D. did, by his bond, bearing date the day of last past, become bound unto A. B. of, &c. mercer, in the penal sum of 200l. conditioned for the payment of 100l. and lawful interest, on a certain day now past, and which bond is now in the custody of this deponent. And this deponent further saith, that the said A. B. did, by inden-

On an assignment of a bond, made by the assignee.

(a) An affidavit stated "that defendant is indebted to plaintiff in £ upon a bond bearing date, &c. and made and entered into by defendant to plaintiff in the penal sum of £" without shewing the condition of the bond is insufficient, and the court discharged defendant on common bail. *Bosanquet and others, surviving partners, &c. v. Fillis, 4 Maule and Selwyn, 330.*

ture, bearing date the day of last past, assign, transfer, and set over the said bond unto him this deponent, and all monies due and owing thereon, for a valuable consideration then paid by this deponent to the said A. B. And this deponent further saith, that he hath not received any part of the said 100l. or the interest thereof due on the said bond; nor hath the said A. B. to the knowledge or belief of this deponent, received the said 100l. or any part thereof, or the interest thereof, since the said assignment: and that the said C. D. is now justly indebted unto this deponent, as assignee as aforesaid, in the sum of 102l. 10s. for the principal and interest due upon the said bond. And, &c.

As to the joining the obligee with the assignee.

Some practisers think *the obligee* should join in this affidavit with the assignee; but I find in 1 *Wils.* 232. in *Loveland* and *Bassett, Trin.* 16 *Geo.* 2. where an assignee of a bond swore, that the obligor was indebted in 90l. for principal and interest upon the bond, as he believed, was held sufficient to hold to special bail.—*Cur.* said, As the assignee had the bond in his own custody, it was of itself some evidence of the debt; and the presumption must be, that it was not paid, as the bond was not cancelled or given up to the obligor.

The like where the obligee joins with the assignee.

A. B. of, &c. and C. D. of, &c. severally make oath and say; and first, this deponent A. B. for himself saith, that G. H. did by his bond, bearing date the day of 18 , become held and bound unto this deponent in the penal sum of 200l. conditioned for the payment of the sum of 100l. together with lawful interest for the same, on a day now past. And this deponent further saith, that he did by indenture, bearing date the day of last past, assign the said bond, and all monies due thereon, for a valuable consideration paid to this deponent, unto the other deponent C. D. And this deponent further saith, that he hath not received the said 100l. or any part thereof, or the interest thereof, from the said G. H. either before, or since the said assignment. And this deponent C. D. for himself saith, that the said G. H. is justly indebted unto this deponent, as assignee as aforesaid, 105l. for the principal and interest due on the said bond. And, &c.

Affidavit for money due on a judgment.

A. B. of, &c. mercer, maketh oath and saith, that C. D. is justly and truly indebted unto this deponent in 30l. upon and by virtue of a judgment recovered by this deponent in this honourable court, against the said C. D. as of

term last past; and also in the further sum of 5l. for his costs taxed thereon. And, &c.

A. B. of, &c. grocer, maketh oath and saith, that C. D. is indebted unto this deponent in pounds, for the arrears of a certain annuity due to this deponent, upon and by virtue of a bond, bearing date the day of , 18 , entered into by the said C. D. to this deponent, in the penal sum of 200l. conditioned for the payment of the sum of 10l. a year, to this deponent, during the life of the said C. D. And, &c.

On an annuity bond.

A. B. of, &c. maketh oath and saith, that C. D. is indebted unto this deponent and one J. M. as assignees of the estate and effects of J. K. a bankrupt, in 20l. for goods sold and delivered by the said J. K. before he became a bankrupt, to the said C. D. and at his request, as appears by the books of account of the said J. K. in the possession of this deponent, and which sum this deponent verily believes to be due from the said C. D. to the estate of the said J. K. And, &c.

By one assignee of a bankrupt.

J. K. of, &c. grocer, executor of the last will and testament of A. B. deceased, maketh oath and saith, that *Richard Roe* is justly indebted unto this deponent, as executor as aforesaid, in 50l. for goods sold and delivered by the said A. B. in his life-time, to the said *Richard Roe*, as appears by the books of the said A. B. and as he, this deponent, verily believes. And, &c.

By an executor, for goods sold and delivered.

Upon and by virtue of a judgment of this honourable court, for the sum of 50l. recovered by the said A. B. in his life-time, against the said C. D. and which said judgment is still in force and unsatisfied, as appears by the record of the said judgment, and as he this deponent verily believes. And, &c.

By an executor on a judgment recovered by his testator.

In order to hold a defendant to bail for an assault, an affidavit must be prepared, and laid before a judge, which is to be engrossed on a 2s. 6d. stamp paper, and sworn before him; if he approves thereof, he will make an order to hold the defendant to bail.

To hold to bail for an assault.

J. G. of, &c. mariner, the plaintiff, and J. W. of, &c. surgeon, severally make oath and say: and first this deponent J. G. for himself saith, that in the month of

Affidavit to hold to bail for an assault.

last past, the above named W. F. made an assault upon this deponent, and did beat and kick this deponent in so violent a manner on his groin, and other parts of his body, that this deponent has ever since that time been in great pain; and this deponent has at this time a rup-

ture in his right groin, descending into the *scrotum*, occasioned by the kicks and blows which this deponent received from the said W. F. whereby this deponent is rendered utterly incapable of getting his livelihood. And this deponent further saith, that to the best of his knowledge, he never was subject to, nor had a rupture, before the said assault was made upon him this deponent as aforesaid; and that the said kicks and blows given him by the said W. F. are the sole cause of the said rupture. And this deponent further saith, that he has applied to several eminent surgeons for advice to be cured of the said rupture, but has been informed by them that the same is incurable. And this deponent further saith, that he knows and is well acquainted with the said W. F. and that he is in very good circumstances. And this deponent further saith, that he believes the said W. F. soon intends leaving this kingdom, and that he has not made this deponent any satisfaction for the said assault. And this deponent J. W. for himself saith, that he hath viewed the other deponent's right groin, and that he has got a rupture in his said right groin descending into the *scrotum*, which in this deponent's opinion is incurable, and renders him utterly incapable of following his business.

Mesne profits. In an action for the *mesne profits* after recovery in ejectment, a judge may order *special* bail, if he thinks proper on affidavit of the amount of the damages; but it cannot be done without.

For not delivering of goods pursuant to a bill of lading.

J. B. of, &c. maketh oath, that C. D. is justly indebted unto this deponent in 270l. being the value of one parcel of merchandize received by the said C. D. on board a ship or vessel called the *Swift*, whereof the said C. D. was commander; and for which the said C. D. as appears to this deponent, and as this deponent verily believes, signed or subscribed a bill of lading, bearing date the day of last, thereby undertaking to deliver to this deponent, or his assigns in *London*, the said parcel of merchandize, which the said C. D. hath not delivered, although the said ship hath long since arrived in the river of *Thames*.

On a bond made in Scotland.

In the sum of 150l. on and by virtue of a certain instrument in writing, made according to the laws of the kingdom of *Scotland*, and there called a bond.

Against an underwriter on a policy.

In 90l. for an average loss on the said C. D.'s subscription of the sum of 100l. as an underwriter, on this deponent's interest in goods shipped on his own proper account, in the ship J. N. F. late master, on her late voy-

age from *London to New York*, in the prosecution of which said voyage, the said vessel and the greatest part of her cargo were lost.

If an affidavit to hold to bail be sent from *Scotland*, Scotland or *Ireland*, such affidavit, it must be remembered, is to Ireland. contain *all the requisites that are essential to affidavits for holding to bail in England*; therefore the clause of no offer having been made pursuant to stat. 37 Geo. 3, of bank notes, must be inserted. 7 Term Rep. 376. in notes.

Where an affidavit of debt contained no place in the jurat, but purported to be sworn before the chief justice of the King's Bench in *Ireland*, and to be signed by him, and such signature was verified by affidavit here: held that it was sufficient foundation for arresting the defendant under a judge's order on mesne process. *French v. Bellow and Culhmore*, 1 Maule and Selw. 302.

THE COUNTIES OF ENGLAND.

Bedfordshire	Lincolnshire
Berkshire	Middlesex
Buckinghamshire	Monmouthshire
Cambridgeshire	Norfolk
Cheshire, C. Pal.	Northamptonshire
Cornwall	Northumberland
Cumberland	Nottinghamshire
Derbyshire	Oxfordshire
Devonshire	Rutlandshire
Dorsetshire	Shropshire
Durham, C. Pal.	Somersetshire
Essex	Staffordshire
Gloucestershire	Suffolk
Hampshire	Surrey
Hertfordshire	Sussex
Herefordshire	Warwickshire
Huntingdonshire	Westmoreland
Kent	Wiltshire
Lancashire, C. Pal.	Worcestershire
Leicestershire	Yorkshire

It appears that *Alfred the Great*, a Saxon king, was the first that divided *England* into *counties* or *shires*.

They are subdivided into *Maritime* and *Inland*. There *Maritime* and are 19 of the former; *seven* whereof are situate on the inland. *German Sea*, *six* on the *Channel*, *two* at the *Severn's Mouth*, and *four* upon the *Irish Sea*, or *St. George's*

Channel: those on the *German Sea* are, *Northumberland*, *Durham*, *Yorkshire*, *Lincolashire*, *Norfolk*, *Suffolk*, and *Essex*.

Those on the *Channel*, *Kent*, *Sussex*, *Hampshire*, *Dorsetshire*, *Devonshire*, and *Cornwall*.

Those at the *Severn's Mouth*, *Somersetshire*, and *Monmouthshire*.

Those in the *Irish Sea*, *Cheshire*, *Lancashire*, *Cumberland*, and *Westmoreland*.

Counties palatine, and

The counties of *Chester*, *Durham*, and *Lancaster*, are called *counties palatine*; and writs issued out of the superior courts of *Westminster*, are to be specially directed. 2 *Str.* 1809. *Andr.* 191. *Vide post.*

Wales.

It was formerly holden that a writ of *latitat* did not run into *Wales*, 1 *Wils.* 193, or the counties palatine. 2 *Saund.* 193. But a different practice now prevails, 1 *Dougl.* 213. *Perry v. Jones*, *Lloyd v. Jones*, *id. ib.* which practice is recognized, as to *Wales*, by the statute 13 *Geo.* 3. c. 51.

Cinque Ports.

These are five havens that lie in the east part of *England*, towards *France*: thus called by way of eminence, on account of their superior importance; as having been thought by our kings to merit a particular regard for their preservation against invasions. Hence they have a particular policy, and are governed by a keeper, with a title of *lord warden of the Cinque Ports*; which office belongs to the *constable of Dover*; and their representatives are called *barons of the Cinque Ports*. The five ports are, *Hastings*, *Romney*, *Hythe*, *Dover*, and *Sandwich*; to which *Winchelsea* and *Rye* have been since added.

To *Hastings* belongs, *Seaford*, *Pevensey*, *Hedney*, *Winchelsea*, *Rye*, *Hamine*, *Wakesbourn*, *Creneth*, and *Forthcliffe*,

To *Romney* belongs, *Bromhall*, *Lyde*, *Oswarstone*, *Dangemere*, and *Romenhall*.

To *Hythe* belongs, *Westmeath*.

To *Dover* belongs, *Folkston*, *Feversham*, and *Marge*.

To *Sandwich* belongs, *Fordiwic*, *Reculver*, *Serre*, and *Deal*.

The writ of *latitat* runs into the *Cinque Ports*, and is directed to the *constable of Dover Castle*, or to his deputy, or lieutenant.

PROCESS.

Of the Proceeding by Bill.

THERE are two ways of bringing an action in this court in *common cases*, by one common person against another, where the defendant is not in actual custody—the one *by bill*, the other by *original writ*.

If therefore the defendant reside in *Middlesex*, or be met with in *that* county, and the plaintiff proceeds *by bill* in this court, the *first process* is called a *bill of Middlesex*, which is a *precept*, and not a *writ*; having only a *return*, and no *teste*, nor is it directed to the *sheriff* himself. Proceeding by bill.
1 Black. Rep. 506.

In case he reside in, or is to be found in any other county, the *first process* is called a *latitat*.

The *latitat* is a *testatum writ*, grounded upon the *bill of Middlesex*, supposed to be sued out *before*, and returned *non est inventus*. Latitat.

The writ of *latitat* is in the nature of an *original writ*, called a *clausum fregit*, and its antiquity beyond the memory of man. In nature of an original.

It ought to be under the *teste* of the *chief justice*, or of the *senior judge* of the court, if there be no *chief justice*; and if it issues from any other court, it is to be under the *teste* of the first in commission. *Dalt. c. 132. Finch. 436. Cro. Car. 390.* As to the teste.

The writ of *latitat* should be directed to the *sheriff* or *sheriffs* of the county, where the defendant is supposed to be, or, if the *sheriffs* be parties, to the *coroner* (or *coroners* of the county, *if two or more*;) and if the *coroners* be parties, to *elisors* named by the master. How to be directed.
1 Black. Rep. 506.

The *latitat* may be tested *before* the cause of action, and if sued out in *term time*, it is usually tested on the *first day* of that term; if sued in *vacation*, on the *last day* of the precedent term; if tested in *vacation*, it is altogether void, *2 Burr. 967, 954. 5 Bur. 2588.* and must be made returnable on a day certain in *term time*, as on *Monday* next after the morrow of *All Souls*, *1 Str. 395.* The teste and return of a latitat.

See return of writs, *ante*, and all continued writs must be tested the day the former is returnable. 2 Salk. 699.

As to suing it out before Cause of Action.

Though a *latitat* may be taken out *before* the cause of action, yet the party cannot be arrested upon it, *until after*. *Hanway v. Merry*, 1 Vent. 28.

Latitat is the true commencement of actions brought by bill of Middlesex, and may be sued before the cause of action accrued, yet if not accrued, may tender.

Although a *latitat* may be sued *before* the cause of action accrued, yet *if the cause of action for a debt has not accrued at the time*, the defendant may, previous, tender the money, and if the plaintiff reply a *latitat* issued *before the tender* made, the defendant may rejoin that *there was no cause of action at the time when the latitat issued*. For the *latitat*, in this case, is to be considered as an *original writ*, when it is replied to the statute of limitations pleaded; or to avoid a tender, it is not the commencement of the suit; and the defendant ought to have the same advantage of it as the plaintiff. The replication, in this case, makes it the commencement of the suit, and therefore to be taken in the nature of an *original writ*. *Wood v. Newton*, 1 Wils. 141. And *Denison J.* agreed, such rejoinder was good. In *Foster v. Bonner* it was resolved upon solemn argument (which was an action of trespass) that the rule to consider the bill, not the *latitat*, as the commencement of the suit, is subject to several exceptions; for instance, where the defendant has pleaded, that one of the statutes of limitations had attached *ante exhibitionem billæ*, the plaintiff may reply a *latitat* sued out of the preceding term, and the defendant may rejoin, that the *latitat* was not in fact sued out *till the vacation* after such preceding term, and after the expiration of the time limited for bringing the action. *Cowp.* 454. 2 Burr. 950. *Johnson v. Smith*. See 2 Saund. 1. d. n. 1.

Plaint in an inferior court.

The plaintiff in an inferior court, is the *original* and *commencement* of the cause, 1 Leon. 303. and therefore being issued *previous* to the cause of action, on a writ of error after verdict for the plaintiff, the judgment was reversed, being substance. *Ward v. Honeywood*, Dougl. 61.

Latitat if issued in vacation before cause of action accrued.

In *Foster v. Bonner*, which was an action of trespass, and the *latitat* issued in vacation *before any cause of action accrued*, but *before the term* a cause of action did accrue, the court held, the *latitat* was only to be considered as process to bring the party into court, and

the cause of action accruing before the declaration *filed*, Vide 1 Wils. that it was sufficient. *Cowp.* 454. But such declaration 147. S. P. must be filed the *first term*, and not the second. *Smith v. Muller*, 3 Term Rep. 624.

The writ was sued out the day before the rent became due, which was the 5th April, 1796, and defendant held to bail: verdict for plaintiff. *Lord Kenyon* holding there was no material difference between aailable writ, and common process; and on motion to set it aside, the court confirmed his lordship's direction, adding, that in aailable writ the latter clause is, "and also to answer to a "bill to be filed." Rule refused. *Best v. Wilding*, 7 Term Rep. 4. But I think plaintiff might have been indicted for perjury. Also at a summons before a judge to shew cause why, upon payment of the debt, without costs, would have been the right way to have proceeded in this case, stating the fact by an affidavit.

If the plaintiff prove a cause of action before the bill filed, though after writ sued out, it is sufficient, though it is aailable writ.

It is said, as the process is *de die in diem*, it cannot be made returnable on the day of suing it out. *Green v. Rivet*, 2 *Ld. Raym.* 772. *Sellon*, 90. But where a bill of *Middlesex* was sued out, and made returnable same day, the court held it might, and discharged the rule to set aside the proceedings; *Oxlade v. Davidson*, 4 Term Rep. 610; it is there said, this was in every day's practice, to sue out writs and make them returnable same day.

Process now may be sued out and made returnable same day.

Where it becomes material to distinguish, the court will consider the day when the writ is taken out, as the substance, and the *teste*, as the *form*. 2 Burr. 962. *Johnson v. Hargreaves*.

Where plaintiffs sued out aailable writ as executors, and afterwards declared in their own right for goods sold and delivered by them, the court discharged defendant on common bail. *Douglas and others v. Irlam*, 8 Term Rep. 416. See 5 Term Rep. 402.

If writ sued out as executors, and declaration in their own right, bad.

The writ of *latitat* was holden to be a good commencement of the suit in a penal action. 2 *Lord Raym.* 883. 2 Burr. 964. 3 Burr. 1243. *Contra*, *Carth.* 233. So a writ of *capias ad respond.* 2 *Black. Rep.* 924.

Latitat considered as an original.

The true time of taking out the *latitat* may be averred contrary to the *nominal teste*. 1 *Vent.* 362.

True time may be averred.

As to the Arrest on and Service of the Bill of Middlesex.

- Bill of Middlesex.** It has now become a settled point that a bill of Middlesex cannot be served in London, or any other county. *Borman v. Bellamy*, 1 Term Rep. 187 Doug. 384, *Devenege v. Dalby*, as it would put an end to the writ of latitat; and see *Price and Jackson*, 1 Maule and Selw. 442.
- If place be doubtful.** If the place where the defendant was served with a bill of Middlesex be doubtful whether in London or Middlesex, such service will be deemed good. *Drew v. Marriot*, 1 Wilson 77.
- May be served at eight in the evening on return day.** It may be served the day it is returnable, though the declaration be left in the office in the course of the same day. 1 Term Rep. 191.
- As to service of process on Sunday.** Service of process on a Sunday is absolutely void by stat. 29 Car. 2. c. 7. s. 6, and cannot be made good by any subsequent waiver of the defendant, as by objecting after rule to plead given. 3 East Rep. 155. *Taylor v. Phillips*. It appeared the writ was served 13th June, that bail was filed according to the statute, and notice of declaration given 7th August, and rule to plead 6th November, and that on the 15th July, five weeks after the service, the defendant's attorney applied to settle the debt, and also for an account of the debt and costs. The stat. sec. 6. enacts that the service of every such writ shall be void to all intents and purposes.
- To what the stat. extends.** The statute applies not only to writs, but to all notices on which rules are made, &c. 8 East. 547.
- A rule nisi cannot be served on a Sunday. *M'Ilham v. Smith*, 8 Term Rep. 86.
- As to the ac etiam.** There is a general rule, *Hil. 2 Geo. 2.* that where the cause of action is generally set forth in the writ, the defendant shall plead without imparlance. The same term a notice was fixed up in the King's Bench office as follows:
- Notice as to inserting an ac etiam.** All clerks and attornies that intend to proceed according to the above rule, are to take notice, that in suing out such writs they do not insert the *ac etiam*, the whole declaration at length, but only describe the cause of action shortly, according to the specimen hereunder set forth, varying the same as the nature of the action shall require.

"Of a plea of trespass; and also to a bill of the said *The ac etiam.*
 "A. B. against the aforesaid C. D. for fifty pounds for
 "divers goods, wares, and merchandizes, sold and deli-
 "vered to the said C. D. by the aforesaid A. B. according
 "to the custom," &c.

In *Davison v. Frost* an objection was taken to a latitat whereon defendant had been arrested and holden to bail for 1771. for that the sum for which he was arrested was not inserted in the *ac etiam* part of it. It was contended, that the *ac etiam* was wholly nugatory, because neither the sheriff, nor the party, is bound by it, but only by the sum sworn to and indorsed on the writ. *5 Term Rep.* 402. *Lord Ellenborough* said, that the writ was irregular in the frame of it, as not being in conformity to the above rule of court, which gave the form of the *ac etiam* clause, in which is stated the amount of the debt, and by which the practice had ever since been regulated. *Rule absolute for common bail.* *2 East.* 305. *An omission in the ac etiam part of the sum for which the defendant is arrested on bailable process, is irregular.*

As to the issuing a bailable Bill of Middlesex.

It is to be observed, that for separate causes of action, several defendants cannot be joined either in the same writ, as in process not bailable. *4 T. R.* 695. *Separate causes.*

And that in a joint action, no more than *four* defendants can be put in one writ. Therefore if there be five or more defendants, two writs are necessary; but there is no necessity for more than one warrant to prosecute, and all the defendants are to be there named. *In joint action four defendants.*

In *Yardley v. Burgess*, cited in *4 Term Rep.* 697, in actions not bailable the court held, that four defendants may be put in one writ for distinct causes of action. *Actions not bailable, four defendants in one writ for distinct causes.*

But if the plaintiff hold two defendants to bail, on a joint writ, and declare against them severally, the court will set aside the declaration, and subsequent proceedings for irregularity. *Thompson v. Cotter*, *1 Maule and Selw.* 56.

By statute 25 *Geo.* 3. c. 80. *sect.* 13. No attorney shall sue out a writ or process, or commence, prosecute, or defend any action, unless he shall have delivered to the officer, or his deputy, appointed to sign or issue the first process for the plaintiff, or to enter, file, or record the *No writ to be sued without memorandum, of attorney's warrant to prosecute or*

defend on
stamp.

Officer to file
the same.

bail or appearance for the defendant, a memorandum or minute of his warrant, duly stamped; containing the names of the parties, the court, and the attorney. Sect. 13. which memorandum or minute the said officer or his deputy shall receive, and forthwith enter or file of record, and shall sign thereon the day of the delivering it. Sect. 14.

In all cases, whether the process be serviceable, or bailable, a memorandum or warrant to prosecute is necessary, by the above act. It is on a 5s. stamp, by *stat. 55 Geo. 3. c. 184. sched. part 2. s. 3.* which is delivered to the signer of the writ. The form of it is as follows:

The memo-
randum or
warrant 5s.
stamp.

In the Court of King's Bench.
Middlesex (to wit) E. F. is retained to prosecute by
A. B. as his attorney, against C. D.

No. *on* } E. F. plaintiff's attorney.
the file. } *Temple.*

(If by an agent to the attorney immediately retain-
ed, add) " by G. G. his agent."

Entered or filed of record this day of
in the 57th year of king Geo. the 3d.

Præcipe.

Middlesex, (ss.) Bill for A. B. against C. D. (a) case
for 100l. upon promises, returnable on next .
after

Oath for £ } E. F. attorney (or agent) (a)
per affidavit filed. } *March, 1817.*

Bill of Middle-
sex. bailable;
5s. stamp.

Middlesex, } The sheriff is commanded to take
to wit. } C. D. and John Doe, if they may be
found in his bailiwick, and safely keep them, so that he
may have their bodies before the lord the king at West-
minster, on next after to answer A. B.
in a plea of trespass, and also to a bill of the said A. B.
to be exhibited against the said C. D. (b) for l. upon
promises, according to the custom of the court of the

Ac etiam in
case.

(a) This indorsement is required by the *stat. 2 Geo. 2. c. 23. s. 22.* to be on all process. But the omission will not vitiate the same. *12 Geo. 2. c. 13. s. 4.*

(b) The nominal defendant *John Doe*, is never inserted in the *præcipe* or in the *ac-etiam*.

said lord the king, before the king himself; and that he have then there this precept.

By bill.

E. F. Attorney, (or agent)

Inner Temple, (a) 1817.

Oath for 1. per affidavit filed.

Law and Markham.

Indorse the attorney's name and place of abode on the back, with the sum sworn to, and the day it is sued out, *Loft. 58. Burr. 20.* as to indorsing the attorney's name.

Take the bill of Middlesex, *affidavit* and *præcipe*, As to suing it together with the *warrant to prosecute*, and your client, out. to the Bill of Middlesex Office, No. 6, *Clifford's Inn*; pay for the swearing affidavit 1s. signing the precept 6d. in term time, and 10d. in vacation; then get a warrant thereon at the sheriff's office, for which pay 1s. and deliver it to your officer.

The arrest may be made at any time before or on the return day of the writ (except Sunday) and at any place within the county, (except where the defendant is privileged.) But it cannot be made between the day of the return, and *quarto die post*, by original. 1 *Sid. 229.* When the arrest may be made.

Where a writ was sued out against the defendant and three others, founded on four several affidavits, *Lord Kenyon* discharged the defendant out of custody. *Stephens qui tam v. Butcher.* See the cases in title Affidavit of *Goodwin v. Parry*, and *Gilby v. Lockyer.* Writ against four, and four affidavits.

The rule why several defendants for separate causes of action cannot be joined in the same writ, or in the same affidavit, is founded on the old practice by original, which only included one defendant: and if that writ only issued against one defendant, the latitat in which the plaintiff was permitted to add the *ac etiam* to save expences, ought to be confined to one. 4 *Term Rep.* in (n) 697. *Holland v. Johnson.* Rule why several defendants for separate causes cannot be joined.

If the defendant cannot be taken on the bill of *Middlesex*, then make out an *alias*, and if not taken, issue a *pluries*, and so proceed on with *pluries pluries*, until he be taken, if he lives in that county.

(a) This indorsement is required by the stat. 2 *Geo. 2. c. 23. s. 22.* to be on all process. But the omission will not vitiate the same. 12 *Geo. 2. c. 13. s. 4.*

Præcipe for alias or pluries. *Middlesex, Alias (a)* bill for A. B. against C. D. trespass, case for l. on promises, returnable on next after

Oath for l. per } E. F. attorney or agent
affidavit filed. } *Inner Temple.*

Bill of *Middlesex* sued out day of 1817.

Alias bill of *Middlesex.* *Middlesex,* } The sheriff is commanded, as before
to wit. } he was commanded, to take C. D.
and *John Doe* (as in the 1st precedent) (b) together with indorsement, &c.)

Pluries, bill of *Middlesex.* *Middlesex,* } The sheriff is commanded, as often-
to wit. } times he has been commanded to
take (as in the first precedent together with indorsement, &c.)

These writs are signed at the same office, as before mentioned; pay signing 2d.

How to proceed if the defendant lives in a liberty. If the defendant reside within a liberty where the sheriff of *Middlesex* may not enter, make out a *non omittas* bill of *Middlesex*, whereupon the sheriff will grant his mandate to the high bailiff of *Westminster*, who makes a warrant thereon to his officer to arrest the defendant. I believe the warrant is now made out in the first instance, pay 1s.

Præcipe for a non omittas bill of *Middlesex.* Non-omittas bill of *Middlesex* for A. B. against C. D. tr. case for l. upon promises returnable on next after
Oath for l. as per } E. F. attorney (or agent)
affidavit filed. } *Inner Temple,*
1817.

Non omittas bill of *Middlesex*, bailable. *Middlesex,* } The sheriff is commanded that he
to wit. } omit not by reason of any liberty in his
bailiwick, but that he enter the same and take C. D. and *John Doe*, if they be found in his bailiwick, and them

(a) Pluries bill for, (or *pluries pluries* for.)

(b) The *alias* should correspond with the previous process in the names of the parties, otherwise the court will set proceedings aside. So must the *pluries*, and also the *ac etiam*, 3 Term Rep. 660.; or these writs will be bad.

safely keep, so that he may have their bodies before the lord the king at *Westminster*, on next after to answer A. B. in a plea of trespass, and also to a bill of the said *John*, to be exhibited against the said C. D. for . l. upon promises, according to the custom of the court of our lord the king, before the king himself, and that he have then there this precept.

By bill.

Oath for . l. per affd. filed.
J. K. attorney or agent.
_____ 1817.

*Law and
Markham.*

This is taken to the Bill of Middlesex Office as before ; How sued
pay signing as for the bill. out.

There is one distinction made in the filling up a bill of *Middlesex* and the writ of latitat when bailable, which is this: in the bill of *Middlesex*, the *ac-etiam* is, and also to a bill of the said plaintiff to be exhibited against the defendant " according to the custom of the court of the " said lord the king before the king himself." In the latitat state, " according to the custom of our court before us." Distinction as
to bailable
process, and
other process.

If the Defendant is not to be found in Middlesex.

If the defendant cannot be found in *Middlesex*, and is to be met with in *London*, or in any other city or county, then get an office copy of the affidavit at the Bill of Middlesex Office (which will save a new one being made,) pay for the same 1s. and 2s. 8d. for the stamp, which take to Messrs. *Provost and Chambre*, sue out a latitat thereon, directed to the proper sheriff, or sheriffs of the city, town, or county, where the defendant is to be arrested.

If a warrant to prosecute has been once filed, there needs no other, but add that to the præcipe thus, " bill of Middlesex, sued out day of 1817."

CITIES AND TOWNS HAVING A SHERIFF OR SHERIFFS.

There are counties corporate, which are certain cities and towns, some with more, some with less territory annexed to them, to which, out of special grace and favor, the kings of *England* have granted to be counties of themselves, and not to be comprised in any other county ; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein ; such are the

	Cities of		Cities of	
	<i>Bristol</i>	} Have two sheriffs	<i>Canterbury</i>	} One sheriff. One sheriff.
	<i>Coventry</i>		<i>Exeter</i>	
	<i>Chester</i>		<i>Litchfield and</i>	
	<i>York</i>		<i>Worcester</i>	
	<i>Gloucester</i>		Towns of	} One sheriff.
	<i>Lincoln</i>		<i>Kingston upon Hull</i>	
	<i>London</i>		<i>Southampton</i>	
	<i>Norwich and</i>		<i>Poole and</i>	
	<i>Town of Nottingham</i>		<i>Newcastle upon Tyne</i>	
How to direct the writ.	To our sheriffs of our city of		To our sheriff our city of	
	<i>Bristol</i>		<i>Canterbury</i>	
	<i>Coventry</i>		<i>Exeter</i>	
	<i>Chester</i>		<i>Litchfield and county of</i>	
	<i>York</i>		<i>same city (a)</i>	
	<i>Gloucester</i>		<i>Worcester</i>	
	<i>Lincoln</i>			
	<i>London</i>		To our sheriff of our town	
	<i>Norwich</i>		<i>and county of</i>	
			<i>Kingston upon Hull</i>	
			<i>Southampton</i>	
			<i>Poole</i>	
			<i>Newcastle upon Tyne</i>	
	To our sheriff of our town			
	<i>and county of Nottingham</i>			

In other counties there can be no difficulty in directing the writ; as, to the sheriff of *Berkshire*, &c. unless it be a *habeas corpus* to remove a cause out of the inferior courts. For these directions, see title *Habeas Corpus*.

Counties palatine.

If the defendant lives in a county palatine, viz. *Chester*, *Lancaster*, or *Durham*; or within any of the *Cinque Ports*, viz. *Hastings*, *Romney*, *Hythe*, *Dover*, or *Sandwich*, then the writ must be directed as follows:

Chester.

To our chamberlain of our county palatine of *Chester*, or his deputy there, greeting, &c.

Lancaster.

To our chancellor of our county palatine of *Lancaster*, or his deputy there, greeting, &c.

Durham.

To the reverend father in God by divine permission, lord bishop of *Durham*, or to his chancellor there, greeting, &c.

And instead of saying in the writs, "our county palatine," say, "your bishoprick."

Cinque Ports.

If to the *Cinque Ports*, the direction is, "to our com-

(a) *Litchfield* is a city and county of itself.

" *stable of our castle of Dover*, or to his deputy there,
" *greeting, &c.*"

-If the action be against the present sheriffs, the writ Sheriff must be directed to the coroner of the city of *London*, and coroners of any other county.

Forms of Ac Etiams.

And also to a bill of the said A. B. to be exhibited Ac etiam in against the said C. D. for l. upon promises, case. according to the custom of our court before us.

To answer A. B. in a plea of trespass, and also to a The like in bill of the said A. B. to be exhibited against the said C. D. debt on bond. for 100l. debt, according, &c.

In a plea of trespass, and also to a bill of the said A. The like in B. to be exhibited against the said C. D. for converting trover. and disposing of the goods and chattels of the said and the value of pounds, according, &c.

In a plea of trespass, and also to a bill of the said A. The like in B. to be exhibited against the said C. D. for detaining the detinue. goods and chattels, (or deeds or writings) of the said A. B. to the value of according, &c.

In a plea of trespass, and also to a bill of the said A. B. The like in to be exhibited against the said C. D. for breach of covenant. covenant. to the damage of the said A. B. of l. according, &c.

In a plea of trespass, and also to a bill of the said A. B. The like for to be exhibited against the said C. D. for a certain trespass and assault committed by the said C. D. on the an assault. said A. B. to the damage of the said A. B. of l. according, &c.

In a plea of trespass, and also to a bill of the said A. The like in B. to be exhibited against the said C. D. for assaulting and crim. con. having criminal conversation with E. B. the wife of the said A. B. to the said A. B. his damage of l. according, &c.

In a plea of trespass, and also to a bill of the said A. B. The like at the and E. F. as executors of the last will and testament of suit of executors. W. C. deceased, to be exhibited against the said C. D. for l. upon promises, according, &c.

In a plea of trespass, and also to a bill of the said A. B. The like at the as administrator of all and singular the goods, chattels, suit of an administrator. and credits, which were of W. C. who died intestate, to

be exhibited against the said C. D. for l. upon promises, according, &c.

The like at the suit of assignees of a bankrupt.

In a plea of trespass, and also to a bill of the said A. B. and E. F. as assignees of the estate and effects which were of G. T. a bankrupt, according to the form and effect of the several statutes made concerning bankrupts, to be exhibited against the said C. D. for upon promises, according, &c.

The like for foreign money.

And also to a bill of the said C. for of lawful money of *Great Britain* in debt, being the value of l. of gold and silver currency of the island of *Antigua* in the *West Indies*, to be exhibited according, &c.

The like on a recognizance of bail.

And also to a bill of the said A. B. against the said C. D. in a plea of debt on recognizance according to the custom of our court before us to be exhibited. (a)

If the *ac etiam* be omitted where necessary, the defendant cannot be arrested and held to bail. 2 *East*, 305.

A bailable latitat into London, with *ac etiam* in case.

George the third, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland*, king, defender of the faith, &c. (b) To the sheriffs of *London*, greeting: Whereas we lately commanded our sheriff of *Middlesex* that he should take C. D. and *Richard Roe*, if they might be found in his bailiwick, and them safely keep, so that he might have their bodies before us at *Westminster* at a certain day now past, to answer A. B. in a plea of trespass; "and also to a bill of the said *Thomas*, to be exhibited against the said *John* for 100l. upon promises, according to the custom of our court before us;" and our said sheriff of *Middlesex*, at that day returned to us, that the said C. D. and *Richard Roe* were not found in his bailiwick; whereupon on behalf of the afore-

(a) This *ac etiam* is required by rule, *E. 15 Geo. 2*. This rule applies to the form of the latitat and other subsequent process. In a bill of *Middlesex* the form is in a plea, &c. according to the custom of the court, before the lord the king, before the king himself to be exhibited.

(b) If a bill of *Middlesex*, &c. has been already sued out, the memorandum or warrant will not be again necessary, but add to the *præcipe*, that a bill of *Middlesex* was issued the day of 1812, which will be a warrant for the officers not demanding it. But if not, see warrant, ante, 148.

said A. B., it is sufficiently testified in our court before us, that the said C. D. and *Richard Roe* do lurk up and down, and secrete themselves in your county: therefore we command you, that you take them, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on next after _____, to answer the said A. B. of the plea and to the bill aforesaid; and have you then there this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the _____ day of _____, in the 57th year of our reign. *Law and Markham*.

Oath for 1. as per affidavit filed.

Indorsement.

E. F. attorney (or agent,) Temple, 1817.

London lat. for A. B. against C. D. *tr. ca.* for upon *Præcipe* promises, returnable on _____ next after

E. F. attorney (or agent,) Temple, 1817.

Oath for 1. per affidavit filed.

Take affidavit, writ, *præcipe* and warrant to prosecute, to Messrs. *Prevost and Chambré*, King's Bench Office, in the King's Bench Walks, who will sign the same, pay 2s. 6d. then to the Seal Office, No. 3, Inner Temple Lane, pay 7d. When it is signed and sealed, if defendant is to be arrested in *London*, take it to the office of the secondaries of *London*, No. 14, *Lothbury*, get a warrant thereon, pay 1s.—In *Surrey*, *Essex*, or *Kent*, pay 1s.—any other county, 2s. 6d.

These writs already printed, may be had at the stationers, and the warrant to prosecute as before: they are printed in the plural number, and it has been customary to add, if only one defendant, his name with that of *Richard Roe*, but not in the *ac etiam*.

The writ of *latitat* may be sued out and made returnable the same day. 4 *Term Rep.* 610. *Oxlade v. Davidson*. So the bill of *Middlesex*. 4 *Term Rep.* 610. May be returnable same day.

Ordered, that no printed blanks or other writs be sealed before the same are regularly made out and filled up. *R. H. T.* 21 *Geo.* 2. 1747. No printed blanks to be sealed.

By rule, *Trin.* 54 *Geo.* 3.—“It is ordered, that from and after the last day of that term the seal office shall be open from eleven in the morning till two in the afternoon, and from five to seven in the evening, during term, and for ten Office hours.

after every issuable term, and one week after every other term, and from eleven in the morning till three in the afternoon at all other times.

Of the alias.

If the defendant be not arrested before the return, or on the return day, then issue an alias, which is called an *alias capias* (the *testatum* part being left out,) and is signed and sealed as before; pay signing 2d. seal 7d.

Alias capias.

George, &c. to the sheriffs of *London*, greeting; we command you, as before we have commanded you, that you take *A. B.* and *Richard Roe*, if they may be found in your bailiwick, and safely keep them, so that you may have their bodies before us at *Westminster*, on next after _____, to answer to *A. B.* in a plea of trespass: and also to a bill of the said *Thomas* against the said *C. D.* for _____ l. upon promises, according to the custom of our court, before us to be exhibited; and have there then this writ. Witness *Edward* Lord *Ellenborough* at *Westminster*, the _____ day of _____ in the 57th year of our reign.

Law and Markham.

Indorsement.

Indorse the attorney's name and sum sworn to, as in the former one. Make a *præcipe* as before, only say, "alias *capias*," instead of "*latitat*," and put the day the first writ issued at the foot.

Alias when to be tested.

In all continued writs, the *alias* must be tested the day the former was returnable; *Touchin's case*, 1 *Salk.* 669; the *pluries* the return day of the *alias*.

Pluries.

If the defendant is not to be met with before or on the return-day, sue out a *pluries capias*, which is like the *alias*, only instead of the words, "as before we have" "often commanded you," add, "as we have oftentimes" "commanded you." Put the date of the first writ issued, in the *præcipe*, and say *pluries capias*.

If term be omitted between the teste and return.

If a *term* be omitted between the *teste* and *return* of mesne process, the cause is out of court. Therefore process ought to be *continued from term to term*: but upon writs of execution it is otherwise, as the cause is to come to its end. 1 *Ld. Raym.* 775. 2 *Roll. Rep.* 442. 3 *Wils.* 341.

Not usual to insert (unless in bailable actions) executor, &c.

It is not usual to insert in process (unless where the party is held to bail) on *what account*, or in *what right*, the party sues; as *executors*, the case of an assignee of a *bail-bond*, and the like. *Weavers co. v. Forrest*, 2 *Str.* 1232. But if the plaintiff name himself *executor*, &c. he

then cannot declare in his own right. 8 Term Rep. 416.
Douglas v. Irlam.

Of Counties Palatine.

There are three counties palatine, viz. Lancaster, The counties Chester, and Durham. The county palatine of Lan- palatine.
 caster hath been a county palatine time out of mind. Lancaster.
Crompt. Jurisd. 137. The king created the county of
 Lancaster a county palatine, 60 Ed. 3. 4 Inst. 204.

The writs out of the superior courts, are directed to the chancellor or his deputy. See *ante*.

The county palatine of Chester, is a county palatine Chester.
 by prescription, the most ancient and honourable re-
 maining at this day. Within this county palatine, and
 the county of the city of Chester, there is and anciently
 hath been a principal officer called the chamberlain of
 Chester; who hath, and time out of mind hath had the
 jurisdiction of a chancellor, and the court of Exchequer
 at Westminster is, and time out of mind hath been, the
 chancery court for the said county, whereof the cham-
 berlain of Chester is judge in equity; he is also judge
 of matters at the common law within the said county,
 for this court of chancery is a mixed court.

There is also within the said county palatine, a jus-
 tice for matters of the common pleas, and pleas of the
 crown, to be heard and determined within the said county
 palatine, commonly called the chief justice of Chester.

The city of Chester was made a county of itself by
 K. H. 7. by letters patent.

All writs issuing out of the superior courts at West- Direction of
 minster, to the county palatine of Chester are directed to writs.
 "the chamberlain of Chester or his deputy." See *ante*, 152.

The county palatine of Durham is said to have been Durham.
 erected soon after the conquest, and is parcel of the bi-
 shopric of Durham, but it is a county, palatine by pre-
 scription. 4 Inst. 216. The jurisdiction of the bishop
 extends to all places between Tine and Tese. In this
 county palatine, there is a court of chancery, which is a
 mixed court, both of law and equity. *Ibid*, 218.

All writs issued out of the superior courts at Westmin-
 ster are directed "to the bishop or to his chancellor."
 See *ante*, 152.

This court differs from the others in this, that if an er-

erroneous judgment be given in chancery, or before the justices of the bishop, error shall be brought before the bishop himself, and if he gives an erroneous judgment, error shall be sued, returnable in B. R. *Ibid.* 218.

Palatine
courts.

These palatine courts are superior courts of record, which exercise a jurisdiction within their own precincts, in as ample a manner as the courts of *Westminster*, *Crompton*. 137. that they might have justice administered to them at home. *Vent.* 155.

Latitat runs
into these
counties.

The writ of latitat runs into the several *counties palatine*; for the meaning of the expression, "breve domini regis non currit," is not that the king's writs are not to be executed in such places, but that the court cannot direct them immediately to the sheriff. 2 *Str.* 1089. *Andr.* 191.

To hold to
bail debt must
be 20l.

In these *counties palatine*, in order to hold the defendant to bail on process issuing out of the courts at *Westminster*, the debt must amount to 20l. or upwards. By stat. 11 & 12 *W. 3. c. 9.* the arrest is to be made by the sheriff or his bailiff, by virtue of a *mandate*, to whom the writ is directed. And if the officer to whom it is directed refuse to receive it, he is liable to an attachment. 2 *Str.* 1089. *Chapman v. Maddison.*

Latitat into
Chester, bail-
able.

George, &c. To our chamberlain of our county palatine of Chester, or to his deputy there, greeting: Whereas we lately commanded our sheriff of *Middlesex*, that he should take C. D. and *John Doe*, if they should be found in his bailiwick, and that he should keep them safely, so that he might have their bodies before us at *Westminster*, at a certain day now past, to answer A. B. in a plea of trespass, "and also to a bill of "the said A. B. to be exhibited against the said *Richard* "for upon promises, according to the custom of our "court before us;" and our said sheriff at that day returned to us, that the said C. D. and *John Doe* were not found in his bailiwick; whereupon on the behalf of the said A. B. it is sufficiently attested in our court before us, that the said C. D. and *John Doe* do lurk up and down, and secrete themselves in your county palatine; therefore we command you, that by our writ under the seal of our said county palatine, to be duly made, and to be directed to the sheriff of our said county palatine, you command the said sheriff, that he take the said C. D. and *John Doe*, if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before us at *Westminster*, on — next after

to answer the said *John Denn* of the plea and bill aforesaid, and have there then this writ. Witness, *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign.

Law and Markham.

Indorse the attorney's name, place of abode, and the Indorsement sum sworn to, then sign and seal it as before.

The *præcipe* for the office is as before, and warrant, *Præcipe* only in the margin put "county palatine of *Chester* " *Lat. for,* " &c.

George, &c. To the reverend father in God by divine permission lord bishop of *Durham*, or to his chancellor there, greeting; (go as far as the words, "lurk up and down and secrete themselves in your county palatine," then add these words): therefore we command you, that by our writ, under the seal of your bishoprick, to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded, that he take the said C. D. and *John Doe*, if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before us at *Westminster* on next after , to answer the said A. B. as in the former one.

Latitat into the county palatine of Durham.

"To our chancellor of our county palatine of *Lancaster*, or to his deputy there, greeting" (same as *Chester*.)

The like into the county palatine of Lancaster.

Of the Royal Franchise of Ely, &c.

It seems in ancient statutes, *Ely* was called a county palatine, 33 H. 8. c. 10. 5 El. c. 23 but is now only a royal franchise, and situate in *Cambridgeshire*. It was granted by H. 1. to the bishop of *Ely* and his successors, of hearing and determining as well civil, as criminal pleas. This jurisdiction, the bishop now exercises by his justices, by prescription grounded on the said grant. 4 Inst. 220. *Carth. 109.*

If a party who is sued in the courts at *Westminster*, plead that the lands lie, or that the cause of action arose within *Ely*, it will be bad, for he should have demanded conausance, which is all the jurisdiction a franchise has, *Carth. 109.* But if an action, that in its nature of joint, arise partly within, and partly without the franchise, the franchise cannot claim conausance. 4 Inst. 220.

The bishop of *Ely* has not a palatinate jurisdiction within the isle, though exercising jura regalia there: the Writs issued into this isle must be di-

rected to the sheriff of Cambridgeshire. process issued out of the courts of Westminster into the isle, goes in the first instance to the sheriff of Cambridgeshire, who thereupon issues his mandate to the bailiff of the franchise. 3 *East*. 128.

Definition of franchise. *Franchise* and *liberty* are used as synonymous terms, and their definition is a *royal privilege*, or branch of the king's prerogative, subsisting in the hands of a subject. Finch. L. 164.

The sheriff may appoint a deputy. The sheriff, at the request and costs of the lord of a franchise, having return of writs, shall appoint a deputy to reside in or near the same, who, on receipt of process, shall issue his warrant to the lord of the franchise, to execute the process. Stat. 13 *Geo*. 3. c. 11. *sect*. 6.

Arrest in liberties to be made by the bailiff. And in those particular liberties having return of writs (except upon a *non omittas*,) the arrest should regularly be made by the *bailiff of the liberty*, by virtue of a mandate from the sheriff. But if there be a *non omittas*, the sheriff may arrest even in the liberty, *without* the bailiff thereof.

As to suing a *non omittas capias*. There are a great number of these liberties in *England*, as in the counties of *York, Sussex, Essex, Kent, Middlesex, Huntingdonshire*, &c. therefore I should advise the practiser, as it may now be done, to issue a *non omittas* in the *first instance*, which will save time; 9 *East*. 330. particularly if he is to call on the sheriff to return his writ. *Vide my Office of Sheriff and Coroner*.

If the sheriff enter the liberty and arrest the defendant, *without a non omittas*, the arrest is good, though the sheriff may be liable to an action. *Gillb. C. P.* 27.

Non omittas what. The *non omittas* is a writ directed to the sheriff to enter into a liberty, where he hath made his warrant to a bailiff of a liberty to execute a process, and he hath made no return to him of what he hath done. For liberties must not be privileged to hinder or delay the general execution of justice; and if they, or their ministers do neglect their duties herein, this court may intermeddle, notwithstanding their privileges, to put the process of this court in execution, that the law receive no obstruction by them.

The return of *mandavi ballivo*, which was formerly necessary, is now presumed, and dispensed with; and the *non omittas capias* may be sued out in the *first instance*, which will be as follows:

Non omittas capias, bailable. George the third, by the grace of God, &c. to the sheriff of our county of *Sussex*, greeting: we command you, that you omit not by reason of any liberty in your coun-

ty, but that you enter the same, and take C. D. and John Doe, if they may be found in your bailiwick, and keep them safe, so that you may have their bodies before us at Westminster, on next after , to answer A. B. in a plea of trespass; and also to a bill of the said John to be exhibited against the said C. D. for debt, according to the custom of our court before us; and have you there then this writ. Witness, &c.

Make a *præcipe* as before, only say, *Sussex (to wit.) non omittas capias for, &c.* pay signing 2s. 6d. seal 1s. 2d. get a warrant thereon as before.

The king's writ runneth not into the Isle of Man, nor into Guernsey, or Jersey; yet the king's commission extendeth thither for redress of injustice or wrong; but the commissioners must proceed according to the law and justice of the isles. 4 Inst. 285, 286.

Of suing out Process not Bailable.

If the cause of action does not require bail, or you mean to serve the defendant with process only, then the stat. 12 Geo. 1. c. 29. enacts, "that in all cases where the cause of action shall not amount to 10l. (a) or upwards, in any superior court, the defendant shall not be arrested, but shall be served personally with a copy of the process." And by 5 Geo. 2. c. 27. sect. 4. "That upon every copy of such process to be served, shall be written an English notice to such defendant, of the intent and meaning of such service, to the effect following: "A B. you are served with this process, to the intent that you may by your attorney appear in his majesty's court of King's Bench, at the return thereof, being the day of next, in order to your defence in this action." And for which notice no fee shall be demanded.

It need not be expressed in the notice, to appear the day of instant, or next, or the year for the court will understand it to be the instant or next. 2 Str. 1233. *Weavers co. v. Forrest.*

It is now settled, that the English notice to appear, must be added to all common processes, where the defen-

Common process to be served personally.

Notice.

This notice must be inserted where process is not bailable.

(a) Extended to 15l. except on bills and notes by 51 Geo. 3. c. 124.

dant is *not* held to bail, whether the *cause of action* do or do not amount to 10*l.*; and the case in 1 *Wilson*, 22, is *bad law*. *Lumley qui tam v. Fitz.* 7 Term Rep. 337.

The charge for the service and copy of writ.

Nor shall any attorney charge more for the making and serving a copy of such process on defendant than 5*s.* 5 *Geo.* 2. c. 27. sect. 2. (*be the distance what it may.*) And the name of the attorney who shall be immediately retained or employed, is to be indorsed on every such copy to be served, before the service; sect. 22. Vide 1 *Burr.* 20.

Three things to be observed in filling up process.

In the filling up process not bailable, three things are to be observed. 1. In the notice, the *very day* of the return must be inserted (and by original, though it happen to be on a *Sunday.*) 2. The notice to appear must be directed to the defendant by the same name as the process, being particularly so expressed in the act of 5 *Geo.* 2. 3. That the name of the defendant must be inserted, as thus, "*Mr. A. B. you are served,*" &c. otherwise the writ may be quashed on motion. 1 *Wils.* 104. *Bohema v. James.*

May be served on return day.

The defendant must be served with a copy of the process and notice *personally*, and service at any time on the *return-day*, though the court has risen, is now held to be good service. *Maud v. Barnard*, 2 *Burr.* 812.

Baron and feme.

If it be against *baron and feme*, service on the husband is sufficient for both: and if the husband does not appear for himself and wife, plaintiff may enter an appearance for both: See *Barnes*, 406, 412. But it must express in the notice, "*to appear for yourself and Ann your wife.*"

Against two.

If the action be joint, *viz.* against two or more persons, each must be served with a copy of the process, and each must be named in the notice; but it is not necessary to shew the original, unless demanded. 2 *Str.* 877. *Cas. temp. Hard.* 138. *Barnes*, 422.

Need not shew the original.

Bill of Middlesex; not bailable.

Middlesex, to wit. The sheriff is commanded to take C. D. and Richard Roe, if they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the lord the king at Westminster, on next after _____, to answer A. B. (a) in a plea of trespass, and that he then have there this precept.

By Bill,

Law and Markham.

(a) *Executors, administrators, assignees, and the like* need not be described as such in the process, when a

John Brown " You are served with this process, to the Notice. intent that you may by your attorney appear in his majesty's court of King's Bench at Westminster, at the return thereof, being the day of (b) next, in order to your defence in this action.

"The day of 18 *J. K. Inner Temple.*"

The notice is to be on the *copy* of the writ, and not Notice to be on the writ itself; and the service of such copy without on the copy of the notice is irregular and will be set aside; though the the writ. court discharged a rule for quashing the writ itself on this account. 9 *East*. 528.

In case there should be more defendants than one, the notice must be directed to all of them, as C. D. E. F. and G. H.

George, &c. To the sheriff of *Kent*, greeting: whereas A latitat not we lately commanded our sheriff of *Middlesex*, that he bailable. should take C. D. and *Richard Roe*, if they should be found in his bailiwick, and safely keep them, so that he might have their bodies before us at *Westminster*, at a certain day now past, to answer A. B. in a plea of trespass. And our said sheriff of *Middlesex* at that day The word "trespass" returned to us, that the said C. D. and *Richard Roe* were not found in his bailiwick; whereupon, on the behalf of may be used in all actions, where the party is to be served only. Four defendants may be put in though the actions be separate. 2 Term Rep. 58. *Roe v. Cock.* the said A. B. it is sufficiently testified in our court before us, that the said C. D. and *Richard Roe* do lurk up and down and secrete themselves in your county: therefore we command you, that you take them, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before us at *Westminster*, on next after to answer the said A. B. of the plea aforesaid: and have you then there this writ. Witness *Edward Lord Ellenborough* at *Westminster*, the day of in the 57th year of our reign.

Law and Markham.

Mr. John Denn. " You are served with this process, to Notice. " the intent that you may by your attorney appear in his

service is only required. 2 *Str.* 1232. For upon general process, plaintiff may declare in a *special character*, but not *vice versa*. *Meggs v. Ford*, *E.* 25 *Geo.* 3.

(b) The day of the month need not be expressed in words at length; it may be figures. *Butler v. Cohen*, 4 *Maule and Selw.* 335.

to examine the copy with the original, so as to swear (if necessary) to the service. In particular franchises and jurisdictions the proper officer there should execute the process.

Service of a *latitat* directed to the sheriff of *Surrey*, at *Batson's* coffee-house in the city of *London* is irregular, and the court will set it aside. *Secus* if there be a doubt as to the confines. *Chase v. Joyce*, 4 *Maule and Selw.* 412, *id.* 413, *n.* (a) (b). Latitat must be served in the county into which it is directed.

OF STAYING PROCEEDINGS.

FREQUENTLY after an arrest or service of process, the party may wish to pay the debt and costs, which is done by applying for a judge's summons, and he will, on hearing, make an order for that purpose, which order is drawn up to be paid on a certain day, to be specified; and in the mean time all proceedings be staid: this is only an order conditional on the defendant, who is to proceed by getting an appointment from the master, at the foot of the order, and serving a copy of the said order and appointment on plaintiff's attorney, if the defendant does not pay the debt and costs taxed on the day; then the plaintiff is at liberty to proceed in his action, as the court cannot make the order a rule of court. *Fricker v. Eastman*, 11 *East* 319. How to apply to stay proceedings.

If separate actions be brought against the acceptor, drawer, and indorser on bills of exchange, or on notes, against the drawer or indorsers, and the acceptor of the bill applies to stay proceedings against him on payment of the debt and costs, he must pay also all the costs against the drawer and indorser. But if the drawer of a bill applies, the order will be made on payment of debt and his costs only. 4 *Term Rep.* 691. See 1 *Str.* 515. If acceptor, &c. of a bill applies.

This application may be made to a judge at his chambers at any time pending the suit. To whom this application may be made.

SPECIAL BAIL.

BAIL, *ballium*, (from the *French* *bailler*, which signifies to deliver into hands), is used in our common law for the freeing or setting at liberty one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. *Bract. b. tract.* 2, c. 8. Definition.

The reason
why called
bail.

The reason why it is called bail, is because by this means the party restrained, is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison; and the end of bail is, to satisfy the condemnation and costs, or render the defendant to prison.

Bail and main-
prize the dif-
ference.

Bail and mainprize are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, "that they save a man from imprisonment in the common gaol, his friends undertaking for him before certain persons, for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way." 2 *Haw. Pl. Cr. c.* 88. 4 *Inst.* 180. The chief difference is, that a man's *mainpernors* are barely his *sureties*, and cannot imprison him themselves to secure his appearance, *as his bail may*, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a *Sunday*, confine him *until the next day, and then render him.* 6 *Mod.* 231. *Lord Raym.* 706. 12 *Mod.* 275.

Special bail.

Special bail are *two* or more persons who undertake *generally*, or in a *sum certain*, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal. Generally there are but *two persons* who become bail for a defendant.

The party bailed is delivered by the law into the custody of those who are his bail, and who are to answer the party, if they do not produce the principal to do it.

Absolute or
conditional.

Special bail are *absolute*, or *de bene esse*: they cannot be taken *absolutely*, without consent of plaintiff or his attorney. R. M. 1654. sect. 7, 8.

After notice given they become absolute, if no exception *within twenty days.* R. M. 16 *Car.* 2.

May be put
in before re-
turn of writ.

Bail above may be put in before the return of the writ and may surrender the principal; and an assignment of the bail-bond taken after (if notice has been given) is bad, and proceedings on the bond may be staid. *Hyde v. Whiskard*, 8 *Term Rep.* 456. But I take it, that this does not prevent an arrest, if put in previous thereto.

Bail put in after the term in which the writ is returnable, is not an answer to an action against the sheriff for an escape brought before it was put in. *Moses and another, assignees of Hart, bankrupt, v. Norris*, 4 *Macle and Selw.* 397.

How to proceed after Bail-bond given.

Where the defendant has been arrested or discharged out of custody, upon giving a bail-bond to the sheriff, at the return of the writ, he must, to *discharge* such bond, appear thereto, namely, by putting in *special bail*, or as it is termed, bail *above*; so called in contradistinction to the sheriff's bail, or bail *below*; nor can he render himself in discharge of such bond without *first putting in bail above*. 5 Burr. 2683. *Harrison v. Davies*.

How to proceed when bail put in to the sheriff.

This bail may be put in for the purpose of rendering the defendant (by his own desire) *previous* to the return of the writ. May be put in to render.

It may be put in by the defendant's attorney, in consequence of his undertaking; or by the sheriff or his bail, for their own indemnity. Vide 2 Str. 876. *Berchere v. Colson*. Sheriff, &c.

Who may not be Bail.

By rule, M. 1654. sect. 1. That for preventing of maintenance and brocage, *no attorney* be lessee in an ejectment, *nor bail for a defendant* in this court in any action. And by a general rule, Attornies not to be bail, or lessee in ejectment.

It is ordered, that no attorney of this, or any other court, shall be *bail* in any action or suit depending in this court, nor his clerk. R. M. 14 Geo. 2. See Cow. Rep. 228. *Bologne v. Vaughan*. Nor attorney or his clerk.

But if a person, who by the rules of the court is not permitted to become bail, shall be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond, and proceed upon it, as if no bail had been put in. Ibid. Dougl. Rep. 466. n. If not excepted.

Motion to set aside an attachment against the sheriff, for not bringing in the body. It appeared that the defendant's attorney was bail, the plaintiff's attorney treated this as a nullity, and did not except; the court set aside the attachment. 2 East. 179. The like case as to an attorney's clerk being one of the bail, where plaintiff treated it as a nullity, and took an assignment of the bail-bond, without entering an exception, and proceedings were set aside, *Fozall v. Bowerman*, ib. The C. P. hold the contrary doctrine, 2 Black. Rep. 1180. 1 B. & P. 356. 2 B. & P. 49. *Wallace v. Arrowsmith*. See 1 Taunt. 164.

No sheriff's officer, bailiff, or other person concerned in the execution of process, shall be permitted to be bail No sheriff's officer, &c. shall be bail.

in any action or suit depending in this court. R. M. 14 Geo. 2. The *keeper* of the *Poultry Compter* was rejected. *Dougl. Rep.* 466. *Hawkins v. Magnall*. So *Marshalsea court officers*, and a *serjeant at mace*, though he be a summoning officer to warn juries. 1 *Black. Rep.* 799. So persons convicted of perjury, (and he may be asked if he has not stood in the pillory, 4 *Term Rep.* 440.) are objectionable. *Rex v. Edwards*.

Foreigners.

Foreigners are not admitted to be bail merely in respect of property *abroad*, which is not liable to the process of the court, 4 *Burr.* 2526.; though it has been said that merely having no property in *England* is not of itself a sufficient objection without other auxiliary circumstances. 1 *Black. Rep.* 444. 2 *Black. Rep.* 957. 1323.

When to put in, in London or Middlesex.

When to put in bail in London or Middlesex.

It is ordered, that where any defendant shall be arrested by the sheriffs of *London* or *Middlesex*, by process issuing out of this court, and shall give to such sheriff a bail-bond for his appearance on the day of the return of such process, such defendant shall have leave for *four days after that return*, to put in good bail, at the suit of the plaintiff in such process: and within that time all proceedings upon the bail-bond to the sheriff shall stay. R. M. 8 Ann.

The days how reckoned.

The *four days* are reckoned in this court *exclusive*: and if the last of the four days happen on a *Sunday*, then the defendant has all *Monday* to put in his bail. 2 *Str.* 782. *Stredley v. Sturt*.

When may be put in.

Bail may be put in on a *dies non juridicus*. *Baddely v. Adams*, 5 *Term Rep.* 170. as this is done at the judge's chambers, or his house.

How to put in special Bail by Bill.

How to put in special bail by bill.

The defendant having been arrested and put in bail to the sheriff, the first step to be taken to get rid of the bond is, to put in the *bail above*; to do which, apply for a short copy of the writ at the office where the writ was signed, or at the sheriff's office, together with the *sum sworn to*, for that will be wanted in the future stage of the business. Then get a special bail-piece at the stationer's, stamp 2s. 6d. insert the name of the county the same as that in which the writ issued; and the bail are

to be *two housekeepers*, who can justify in double the sum sworn to, after payment of *all their debts.*(a)

The act of 25 Geo. 3. c. 80. enacts, that every attorney, at the time of putting in bail, shall deposit in the hands of the judge's clerk the memorandum or minute of his *warrant to defend*, stamped with a 5s. stamp, which the judge's clerk is to receive *gratis*; *who is to deliver over the same* to the proper officer. Sect. 25. Memorandum to be delivered on putting in special bail to the judge's clerk.

In an action against husband and wife, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for *himself and wife*, 1 Vent. 49. —If the wife be arrested by *mesne process*, she shall be discharged on common bail, whether she be arrested *singly* or *jointly* with her husband. Cro. Jac. 445. 1 Lev. 216. Husband and wife.

A feme covert was discharged out of custody, because she was arrested *without her husband*, though the writ was sued against *both*, and *non est inventus* returned as to the husband; *Edwards v. Rourke and wife*, 1 Term Rep. 486; for a feme covert has no property of her own; and if it were permitted to arrest her, she might be imprisoned for life. Per Ashhurst, J. Feme covert.

See the case of *Marshal v. Rutton*, where it is now held, that a *feme covert* cannot contract, and be sued as a *feme sole*, even though she be living apart from her husband, having a separate maintenance secured to her by deed. 8 Term Rep. 545. Feme covert cannot be sued as a feme sole, &c.

In the Court of King's Bench.

Middlesex } K. F. is retained to defend by C. D. as his attorney, at the suit of A. B. The form of the memorandum of

Entered or filed of record, } E. F. defendant's attorney; (if by an agent add) by M. defend. warrant to
this day of in the } his agent. defend.
57th year of King Geo. 3. }

If time should be wanted to put in bail, a summons may be obtained for that purpose, and the judge will grant it on terms of putting plaintiff in same state he would have been, had the bail been put in in time, and half an hour's attendance is sufficient. How to obtain time to put in bail.

(a) By rule M. 51 Geo. 3. in bailable causes for any sum exceeding 1000l. it shall be sufficient for the bail above to justify in 1000l. beyond the sum sworn to.

Special bail-
piece, 2s. 6d.
stamp.

— Term, in the 57th year
of the reign of king Geo. III.
(a) Law and Markham.
Middlesex, } C. D. is delivered to bail
to wit. } on a *cepi corpus*
to
E. F. of, &c.
and
G. H. of, &c.
I. K. attorney, } At the suit of
oath for £ } A. B.
Taken and acknowledged
conditionally at my cham-
bers in Serjeant's-inn,
Chancery-lane, this
day of 1817, before
me

Take the bail, and bail-piece, to one of the judge's chambers in *Serjeant's Inn, Chancery Lane*, and the clerk will take the recognizance as follows:

Recognizance
of bail by bill.

" You do jointly and severally undertake, that if C.
" D.(b) shall be condemned in this action, at the suit of
" A. B. he shall satisfy the costs and condemnation mo-
" ney, or render himself to the custody of the marshal
" of the Marshalsea, or you will do it for him.
" *Are you content?*"

Pay the clerk 4s. in term-time, in vacation 5s. ; as soon as you have done this, give notice in writing of the bail being put in, to the plaintiff's attorney, pursuant to the following rule :

Rule respect-
ing notice.

Every attorney of this court, who shall put in any special bail before any justice of this court, *de bene esse*, upon a *cepi corpus*, shall give notice thereof without delay to the plaintiff or his attorney, R. M. 16 Car. 2.

(a) The bail are not regularly put in unless the name of the proper county be inserted. *Smith v. Millar*, 7 Term Rep. 96.

(b) If in a joint action against two recognizance of bail be drawn up by mistake against one only, and the plaintiff after two writs of *sci. fa.* against the bail, and *nihil* returned to them, sign judgment against the bail, and take out execution, the counsel will set aside the judgment and execution for irregularity. *Holt v. Frank, and another*, 1 Maule and Selw. 199.

In the King's Bench.

A. B. plaintiff,

and

C. D. defendant.

Take notice, that special bail was this day put in (if by Notice of bail.
original say, "put in with the filacer,") for the
defendant in this cause, before the Honourable Mr.
Justice —— (a) at his chambers in *Serjeant's Inn, Chan-*
cery-Lane, London; and the names and addresses of such
bail, G. H. of and J. K. of Dated the
day of , 1817.

Yours, &c.

L. M. Attorney for the defen-
dant, *Inner Temple*.

To Mr. A. B. Attorney for the plaintiff.

If they are the *same* as are bail to the sheriff, then you
add, "and they are the same as are bail to the sheriff."

This notice must be served not later than ten at night.
Rule, Mich. 41 Geo. 3. 1 East. 132.

Notice of bail on an arrest, ought to be not only by a Notice, what
note given of the parties *names* who are to be bail, but it ought to
also with *truth*, and *certainty*, their *addition*, *trade* and
place of abode, that so they may be more easily inquired
after by the plaintiff, or his attorney. 11 *Mod. 2*. Also
it is necessary to *entitle* the cause, and name the *street*
they live in, for the *parish* has been held too wide a de-
signation. *Loft. 72, 194, 187, 281*. A notice given in
the name of *one* of the plaintiffs *only*, where there are *joint*
plaintiffs, bad. *Ibid. 237*.

Of excepting to the Bail.

Where bail are put in, in due time, an exception must
first be entered (and notice given) before the rule to bring
in the body; and the court said, that there is no difference
in *this* respect between the *original*, and *added bail*. *Rex*
v. Sheriff of Middlesex, 8 *Term Rep. 258*. Therefore
if the plaintiff be dissatisfied with the bail above, and they
be not the same as are bail to the sheriff, he must except
against them within twenty days after notice given, other-
wise such exception is void, pursuant to the following
rule:

If dissatisfied
with bail.

It is ordered, that no exception to special bail put in
before any justice of this court shall be made for the fu-
ture "after twenty days notice given" of such bail being
put in, according to the course of this court; and excep-
Exception to
bail to be
made within
twenty days
after notice of
bail.

(a) The judge before whom put in, and place where
put in.

tion after that time made, shall be void and of no force.
R. M. 8 Ann.

Exception to
 bail.

Exception must be in *writing* entered in the judge's books before whom the bail was taken; and the entry in the judge's book is thus, "I except against these bail. "G. H. plaintiff's attorney." And the *notice* to the defendant's attorney will be, naming the cause, "I have excepted against the bail put in for the defendant in this cause."

"G. H. plaintiff's attorney."

"To Mr. C. D. attorney for the defendant."

When to justify
 after exception.

That in every action in this court, where special bail is put in, and an exception entered against the said bail, and *notice* of such exception is given in *writing* to the defendant's attorney, the defendant shall procure his said bail to *justify* (if the notice be given in *term time*) in *four days after such notice*; or shall add other bail who shall justify within the said four days; but if such exception be entered in *vacation time*, and notice thereof be given in like manner, the bail put in, or other additional bail, shall justify on the first day of the subsequent term. *R. E. 5 Geo. 2.*

Vacation.

If bail above be put in, and exception entered in the vacation, notice of justification for the first day of the next term must be given within four days after such exception. *9 East. 434.*

No exception
 unless notice
 given.

It is no exception to bail, until the plaintiff give *notice of the exception.* *Oldham and an. v. Burrell, 7 Term Rep. 26.*

Of justifying Bail.

After the plaintiff's attorney has entered his exception, and given notice thereof to the defendant's attorney, the bail (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves (in case they do not mean to render the defendant, which they may do pursuant to the rule, *Trin. 33 Geo. 3.*)(a) and the plaintiff may oppose them by his counsel; if it appear they are *insufficient*, the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the sheriff.

By rule, *Mich. 51 Geo. 3.* it is ordered that from henceforth inailable causes for any sum exceeding 1000l.

(a) This rule extends to the case of the sheriff. *8 Term Rep. 529.*

it shall be sufficient for the bail above to justify in 1000l. beyond the sum sworn to. 13 *East.* 62.

If the *same bail* are to justify, as have been put in, and notice given thereof, *one day's notice is sufficient* for the justification, and such notice may be given on *Friday* for *Saturday*, or on *Saturday* for *Monday*; the form of such notice will be as follows:

A. B. plaintiff,
and
C. D. defendant.

In the King's Bench.

Take notice, that the bail already put in for the defendant in this cause, and of whom you have had notice, will on next justify themselves in open court, *Westminster-hall*, in the county of *Middlesex*, as good and sufficient for the said defendant. Dated this day of 1817.

Notice, justification by same bail.

Yours, &c.

J. K. attorney for the defendant.

To Mr. G. H. attorney for the plaintiff.

If the time allowed for justifying expire in a day in term, which happens to be Midsummer day, or any other holiday when the court does not sit, the notice of justification should be for the day they ought to justify, to prevent an assignment of the bail-bond; and the bail may justify the next day, as a matter of course. *Master Forster, T. 45 Geo. 3.*

As to notice.

A rule was made for the justification of bail in *Trin. Term*, 35 *Geo. 3.* before 10 in the morning. And now by rule, *Hil. 46 Geo. 3.* It is ordered, that in future that rule be strictly attended to. So that the bail must now be at *Westminster-hall* before 10. And if there be a justification by affidavit, the motion must be made before 10.

Bail to attend in court before ten in the morning.

If default be made in putting in bail in time, they must justify, though not excepted to, or assignment of bail-bond may be taken. 7 *East.* 607.

If the bail do not justify within the time limited by the rule, and no further time is given by the court, they are out of court. Nor can they justify after the rule upon the sheriff to bring in the body is expired, without leave of the court. *Loft.* 72. 187. *Per Cur. M.* 25 *Geo. 3.* T. 24 *Geo. 3.*

When bail are out of court.

This court (*H. 7 Geo. 3.* in *Smith v. Trinder*) where the bail were to justify in 4000l. suffered one bail to justify in 4000l. and two other in 2000l. each. *Sellon*, 169.

Three bail justified, *Loft.* 252.

May pray a further day.

Sometimes it so happens that one of the bail cannot attend, or that there be some objection to hinder the justification; in that case, you may justify the *one*, and pray *two* days further time to *put in, and justify another* in the room of the *one* rejected.

Of adding fresh Bail, and justifying.

One of the judges may sit apart for adding and justifying special bail.

By stat. 57 Geo. 3. c. 11. it is enacted, That it shall be lawful for any one of the judges of the court of King's Bench at *Westminster*, when occasion shall so require, to sit apart from the other judges of the same court, in some place in or near to *Westminster-hall* for the business of adding and justifying special bail in causes depending in the same court, whilst others of the judges of the same court are at the same time proceeding in the dispatch of the other business of the same court in bank, in its usual place of sitting for that purpose in *Westminster-hall*, and that the proceedings so had by and before such one of the judges so sitting apart for those purposes shall be as good and effectual in the law to all intents and purposes as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting in *Westminster-hall*.

Of adding fresh bail.

If the bail already put in, do not mean to justify, then you may add *two more* to those already put in on the bail-piece, and give notice of justifying them on the same day; but such notice must be given *two days exclusive* of such justification; as for instance, *exception is entered* against the bail on the 19th of *April*: notice is given to *justify* the 23d, you must deliver such notice on the 21st. So that the notice is *exclusive* of *one day*, and *inclusive* the other: *Monday for Wednesday* is good; *Saturday for Monday* will not do for *added bail*, as *Sunday* is reckoned *no day* for this purpose; *Friday for Monday* is good.

In the King's Bench.

Between $\left\{ \begin{array}{l} \text{A. B. plaintiff,} \\ \text{and} \\ \text{C. D. defendant.} \end{array} \right.$

Notice of adding and justifying.

Take notice, that A. M. of and G. D. of will, on next, add themselves to the bail already put in for the defendant in this cause; and at the same time, will justify themselves in open court, *Westminster-hall* in the county of *Middlesex*, as good and sufficient bail for the said defendant. Dated the day of 1817.

Yours, &c.

J. K. attorney for defendant.

To Mr. G. H. attorney for plaintiff.

May be added in the treasury chamber.

These may be added the same morning you justify in court; pay 2s. each name, but mind and have the bail-

piece in court to give the master; therefore on the *pre-
ceding evening* get it of the *judge's clerk*, or he will attend
with and deliver it to the master; pay him 2s. 6d.

You may put in bail, and justify at the same time by giving notice for that purpose, *two days exclusive* of the day; which is done as follows; fill up a bail piece, take it to the judge's clerk, who will take the recognizance; pay 4s. and 2s. 6d. for delivering it to the master in order to justify; have affidavit of service of notice ready, which give to counsel to move.

May put in
and justify
bail on the
same day.

If you add only *one* person to the bail already put in, and he with one of the other justifies, then your notice will be as follows:

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

Take notice, that E. F. of, &c. will on next add himself to the bail already put in for the defendant in this cause, and that he, together with J. J. one of the bail already put in for the said defendant, and of whom you have had notice, will at the same time justify themselves in open court *Westminster-hall*, in the county of *Middlesex*, as good and sufficient bail for the said defendant. Dated this day of 1817.

Notice of add-
ing one and
justifying.

Yours, &c.

J. K. Attorney for defendant.

To Mr. G. H. Attorney for plaintiff.

If bail do not justify pursuant to the *first* notice, the court before they permit them to justify on the *second* notice, will make the defendant pay the costs (if any) of the first intended opposition.

If they do not
justify pur-
suant to first
notice.

How to justify in Court.

In the evening *bespeak the bail-piece at the judge's chambers*, and the clerk will deliver it to the master in court; pay 2s. 6d. Get an affidavit of the service of such notice sworn, and on the back indorse the names of the plaintiff and defendant, with the counsel's name, "to move to justify the within bail," give it to the counsel with 10s. 6d. and he will move it; take your bail in court to the master; the officer swears them, and the master asks if "they are worth double the sum sworn to, (a) after payment of all their debts," for which pay the officer 9s.; in the evening go to the clerk of the

How to justify
in court.

(a) If under 1000l. If more than that, they are worth 1000l. above the sum sworn to. See rule, ante 169. n. (a).

rules, and he will *draw up the rule* for the allowance of the bail; pay 7s. serve copy on plaintiff's attorney afterwards; get the bail-piece of the *master's clerk*, and file it with Messrs. *Provost and Chambre*.

Rule for allowance of the bail must be drawn up, or an attachment may be had against the sheriff.

Bail was put in and justified, but the *rule* for the allowance of it was not served, bail was opposed, and an attachment against the sheriff was obtained for not bringing in the body. Motion to set it aside. *Lord Kenyon*. Bail is not regularly put in till the *allowance* of it be served, and it is of importance that *all* the steps prescribed by the practice of the court should be followed: if we were to suffer this exception to prevail, it would enable the defendant's attorney to put into his pocket those duties which belong to the revenue. *The King v. Sheriff of Middlesex, 4 Term Rep. 403*. Rule discharged.

Rule for the allowance of bail.

A. B. } Upon reading the affidavit of A. B: *it is ordered*,
v. } that the bail put in for the defendant in this
C. D. } cause, who have this day justified themselves
in court, be allowed, and the bail-piece filed on the motion of Mr. ———

By the court.

N. B. The bail-piece is given to the master at the time of the justification in court, who takes it to his office, the defendant's attorney should get same from the master's clerk, and file it with Messrs. *Provost and Chambre* within 20 days: but if the defendant is in custody *at the time of the justification*, they will not sign the *superse-deas*, for his discharge, until *it be filed with them*; in that case, file it forthwith.

In the King's Bench.

Between

{ A. B. plaintiff,
and
C. D. defendant.

Affidavit of service of notice of justification.

J. C. clerk to E. H. of, &c. attorney for the defendant in this cause, maketh oath and saith, that he did the day of instant, personally serve J. K. the plaintiff's attorney, with a true copy of the notice, hereunto annexed.

J. C.
Sworn, &c.

If you serve the servant of plaintiff's attorney or clerk, say, "Served Mr. J. K. the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk or servant of the said J. K. *at his house or chambers*."

Plaintiff's attorney may consent.

In order to save this trouble and expence, where the

attorney certifies the bail are good to plaintiff's attorney, and he can rely on his word, this mode of justification is dispensed with; and the bail are taken to a judge's chambers to justify by consent; pay 2s.

Bail put in by one attorney for the defendant, and notice for justification given by a *new attorney*, not allowed by the court; the bail shall not be permitted to justify; and the master certified, that by the established practice, a party cannot change his attorney without leave of the court, or a judge's order. *Dougl. Rep.* 217. *Macpherson v. Robinson.* 2 *Black. Rep.* 1323. *Kaye v. De Mattos.* S. P.

Bail put in by one attorney, and notice to justify by another, not good, without leave of court.

If one person be *excepted* to as bail, and another added, the name of the *former* may, when so added and justified, with leave of the court, be struck out of the bail-piece at any time before *scire facias*. *Sayer's Rep.* 58. And proceedings as to him may be staid after *scire facias* brought, *ibid.* 309. till then he is not exonerated. 1 *Black. Rep.* 463.

If one be excepted to, and another added.

One of the bail had not justified, and a motion was made to stay proceedings against him, which was granted; but his name *still remained on the bail-piece*, after two *sci. fa.'s* and *nihils* returned, an *exoneretur* was ordered to be entered *nunc pro tunc*. *Humphry v. Leite,* 4 *Burr.* 2107.

Exoneretur nunc pro tunc.

Mr. J. Yates said, where a bail had not justified, he must apply in *proper time*, to have his name struck out of the bail-piece: and in *Wilkinson v. Lomax* it was said, it was time enough for him to apply when he *first* finds himself attacked. *Ibid.*

Must apply in proper time.

In *Jones v. Tubb*, 1 *Wils.* 337. the court said, as he was excepted to and refused to justify, he might reasonably think he was no longer bail, therefore application after an *insolvency* of one of the bail, was held time enough.

If excepted to.

Mr. John Calendar, a merchant, came to justify as bail; the sum he was required to justify in was 9000l. and he regularly justified in that sum *inclusive* of his landed property in *Jamaica*. He was objected to on account of the including his landed property in *Jamaica*. The court thought the objection a good one; because his *landed property in Jamaica is not liable to the process* of this court. *Boddy v. Leyland*, 4 *Burr.* 2526. *Contra* 1 *Black. Rep.* 444.

As to bail justifying in respect of landed property abroad.

Bail was allowed to justify in respect of property consisting partly of cash, and partly of a freehold house at *Gibraltar. Beardmore and others v. Phillips, 4 Maule and Selw. 173.*

A native of *England* was allowed to justify as bail in respect of property partly in *England*, and partly abroad. *Graham v. Anderson, 4 Maule and Selw. 371.*

Of opposing the Bail.

Opposing bail, on what grounds they will be rejected or not.

R. M. 14 Geo.

2. Cowp. 828.

Dougl. 150.

464.

Black. 799.

4 Term Rep.

410.

4 Burr. 2526.

Generally, bail are opposed on *several* grounds, as that one of them is an attorney, an attorney's clerk, sheriff's officer, keeper of a prison, Marshalsea court officer, serjeant at mace, summoning officer to warn juries, an outlawed person, or one convicted of perjury; or that there is some mistake in the *notice* to justify; namely, that it should have been given *two days* previous, instead of one; that the bail have assumed *names* that are either *feigned* or *belong to other persons*; for the punishment of such bail, *vide* 21 Jac. 1. c. 26. s. 2. 4 & 5 W. & M. c. 4. s. 4. 1 *Str.* 384. But the court will not vacate the proceedings against the party personated, until the offender be convicted; 1 *Vent.* 301. nor can a conviction take place, until the bail-piece be filed, 2 *Sid.* 90, that they are not *house-keepers*: if they be, the rent paid is immaterial, though under 10l. *Loft.* 148.; nor is it necessary they should have been assessed to the poor's-rate, *ibid.* 328. Not being worth *double the sum sworn to*, after payment of *all their debts*. Under this head may be ranked *bankrupts*, who have not obtained their certificates; or such as have been *twice bankrupts*, and not paid 15s. in the pound, *Mountain v. Wilkins, M. 24 Geo. 3.* after the *expiration* of the *rule to bring in the body*. *Loft.* 438. *Higway v. Tyers, M. 20 Geo. 3.* and bail have been rejected, who did not *know* the defendant, *M. 26 Geo. 3.* cited *Tidd, 6 Ed. 268.* or had been bail before, but did not know in how many actions, or for what sums. *Loft.* 72, 194. But it seems that the circumstances of *not knowing* the defendant, being only a mark of suspicion, may be explained away. *Tidd. 6 Ed. 268.* *Lastly, foreigners* are not admitted to justify. See 4 Burr. 2526. *Loft.* 34. 147. *contra* 1 *Black.* 444. and 2 *Black.* 1323; nor persons whose property is out of the jurisdiction of the court, as in *Jamaica*.

If bail do not attend, how to apply for time.

Where the bail do not attend, or are not permitted to justify, on account of a defect in the notice of bail, or justification, the court will in general allow them further

time. *Loft. 72. 187.* But where they are rejected on account of *some personal insufficiency*, the court will not allow further time to add and justify others, until an affidavit of facts in alleging some excuse in the bail not having attended, be made according to the following rule.

Ordered, that in all cases where *motion* is made for giving further time to justify bail, it must be supported by an affidavit of the *special facts*, alledged in *excuse* of the bail not attending at the time mentioned in the notice of justification of such bail. Or in case further time be given upon *suggestion of counsel*, then the bail shall not be permitted afterwards to justify, unless at such given time, such an affidavit be produced as hereinbefore is described. *R. M. 36 Geo. 3.* But bail may render in discharge of themselves, on the day the rule expires, before justification. *Rule, T. 33 Geo. 3. 5 Term Rep. 368 (a).*

Order respecting further time for justifying of bail:

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

J. S. of, &c. clerk to Mr. J. K. attorney for the plaintiff Affidavit to
in this cause, maketh oath and saith, that Mr. L. M. attorney for the defendant in this cause, having served the said J. K. with notice of justifying bail in this action, be this deponent, by the order and directions of the said J. K. inquired into the sufficiency of the bail intended to be justified for the said defendant, and saith that G. H. one of the said bail, hath been a bankrupt, and hath not yet obtained his certificate, as he this deponent hath been informed, and verily believes.

J. S.

Sworn, &c.

Allowance of Bail.

When the bail are allowed, a rule or order of allowance should be drawn up with the clerk of the rules, and a copy of it served on the plaintiff's attorney, even though he has opposed their justification, *4 Term Rep. 493.* after which the bail-piece should be obtained from

How to proceed after allowance of bail.

(a) If bail are opposed by affidavit, the affidavit must first be put in and read, before the bail be asked any questions. *F. T. 1800.*

the judge's chambers, and filed with the master. This should be regularly done, the same term in which they are allowed, *R. Hil. 1650. Reg. 3.* And in filing the bail, it should be observed, that every bail taken *before* the continuance day is a bail, and to be filed of the *preceding* term; and every bail taken *after* the continuance day, is a bail, and to be filed of the *subsequent* term. *R. E. 5 Geo. 2. Reg. 1. R. E. 11 W. 3. Reg. 2. 2 Str. 1215. 1 East. 406.* But where new bail are added to other bail taken on or before the continuance day, and new bail shall be taken and filed as of that term in which the first bail was put in, *R. E. 5 Geo. 2. Reg. 1, b.* If bail has been improperly allowed, the court will set aside the rule for allowance, on payment of the costs of the justification. *Bosanquet v. Simpson, E. 42 Geo. 3. 1 Taunt. 119. S. P.*

Rule for the
allowance of
bail.

A. B. } Upon reading the affidavit of G. H. it is ordered
v. } that the bail put in for the defendant in this
C. D. } cause, who have this day justified themselves
in court, be allowed, and (if by bill) the bail-piece filed
upon the motion of Mr. _____

By the court.

OF PUTTING IN BAIL IN THE COUNTRY, AND TRANSMITTING IT.

Before the *stat. 4 W. & M. c. 4. s. 1.* special bail could only have been put in before a judge in town. But this practice being found productive of great expence and inconvenience, it was enacted by the above *stat.* that "the chief justice and other the justices of the court of King's Bench for the time being, or any two of them, whereof the chief justice for the time being to be one, and the chief justice of the court of Common Pleas, and other the justices there for the time being, or any two of them, whereof the chief justice of the same court to be one, shall or may by any one or more commission(a) or commissions under the several seals of the said respective courts from time to time, as need shall require, empower such and so many persons other than common attornies and solicitors, as they shall think fit and necessary, in all and every the several shires and counties within the kingdom of *England*, dominion of

(a) This commission is subject to a stamp duty of 10s. by *stat. 55 Geo. 3. c. 184. Sched. Part 2. s. 3.*

“ *Wales, and town of Berwick upon Tweed*, to take and receive all and every such recognizance or recognizances of bail or bails, as any person or persons shall be willing or desirous to acknowledge or make before any of the persons so empowered in any action or suit, depending in the said respective courts, in such manner and form or by such recognizance or bail-piece, as the justices of the said respective courts, have used to take the same, which said recognizance or recognizances of bail, or bail-piece, so taken as aforesaid, shall be transmitted to some or one of the justices of the said respective courts, who upon affidavit made of the due taking of the recognizance of such bail or bail-piece by some credible person present at the taking thereof, shall receive the same, upon the payment of usual fees ; which recognizance of bail or bail-piece so taken and transmitted shall be of the like effect as if the same were taken *de bene esse* before any of the said justices.”

By the same stat. c. 2. “ the justices of the said courts shall make such rules and orders for the justifying of such bails, and making of the same absolute, as to them shall seem meet ; so as the cognizor or cognizors of such bail or bails be not compelled to appear in person in the said courts, to justify him or themselves ; but the same may, and is thereby directed to be determined by affidavit or affidavits duly taken before the said commissioners, who are thereby empowered and required to take the same, and also to examine the sureties upon oath touching the value of their respective estates, unless the cognizor or cognizors of such bail, do live within the cities of *London* and *Westminster* or within ten miles thereof. And any judge of assize in his circuit shall and may receive all and every recognizance or recognizances of bail or bails as any person shall be willing and desirous to make and acknowledge before him ; which being transmitted in like manner, shall without oath be received in manner as aforesaid, upon payment of the usual fees.” Sect. 3.

By rule, 8 G. 3. it is ordered, that all bails taken by any commissioner within forty miles distant from *London* and *Westminster*, shall be transmitted to the chief justice, or one of the justices, within eight days after the caption ; *above* the distance of forty miles *within fifteen days* after caption, unless all of them be in their circuits, and

Bail-piece
when to be
transmitted.

then as soon as any one of them shall be returned to chambers.

Book to be kept.

That the commissioner is to keep a book for entering the names of such bail taken, and the plaintiffs, as in the bail-piece, with the name of the defendant's attorney, and the time of taking.

Plaintiff to except within 20 days.

That the plaintiff's attorney may apply to the commissioners book for the names, and if insufficient, may except against them within twenty days after transmitted, and notice to plaintiff's attorney of the caption: and in that case, defendant must either put in better bail, or the cognizors of such bails must justify themselves in court, either by affidavit taken before such commissioner that took the bail, or by oath made in court, or before one of the judges of the said court.

Affidavit of caption.

The affidavit of the caption shall be made before one of the judges, or some person who shall have power to take affidavits in causes depending in this court.

What to contain.

Affidavit to be, that they are housekeepers, respectively worth so much (mentioning the sum they are bail for) after all their debts are paid, or exclusive of all debts or demands due from them to any person or persons whatsoever. N. on said rule.

Six days to put in bail in the country.

In case of arrest of any defendant in any county of this kingdom (except *London or Middlesex*,) by process issuing out of this court, such defendant shall have leave for six days to put in good bail, after the return of such process, without any prosecution whatsoever to be made in the mean time on the bail-bond to the sheriff. R. M. 8 *Ann.*

Note on the above rule.

Notwithstanding the rule, 8 W. 3. I conceive the bail-piece must actually be filed with one of the judges, on the 6th day after the return of the writ, or the bond may be assigned, pursuant to the stat. 4 & 5 *Ann.* c. 19. and notice given, if the proceeding be by bill; but if the bail be taken before the return of the writ, and in vacation time, then the days of transmission may be attended to. Notice should be given of the bail-piece being filed, with the affidavit of the caption to the plaintiff's attorney. No affidavit is necessary upon the transmission, as the clerk keeps the bail-piece, and enters same in the judge's book on his return to town.

How to put in Bail before a Commissioner.

In case the bail be put in before a judge of assize, then fill up the bail-piece on a 2s. 6d. stamp parchment. Take it with the bail to a commissioner of the court, who will take the recognizance, for which you pay 2s. only; and it is usual to have an affidavit engrossed on 2s. 6d. stamp-paper, of the due taking the bail before such commissioner, to which is annexed the bail-piece, and sworn before a commissioner for taking affidavits, but not the person authorized to take such bail.

If put in before a judge of assize.
How to put in bail, and before whom to be sworn.

—— term —— year of the reign of king *Geo. 3d.* Special bail-piece before a commissioner.
—— to wit. C. D. of, &c. is to be delivered to bail on a *cepi corpus* to

E. F. of
and
G. H. of

Oath l. at the suit of A. B.

L. M. attorney for defendant.

Taken and acknowledged conditionally
the day of before me
one of the commissioners.

A. B. plaintiff,
and
C. D. defendant.

In the King's Bench.

T. J. of, &c. maketh oath and saith, That the recognizance of the bail or bail-piece hereunto annexed, was duly acknowledged by J. B. of, &c. and J. R. of, &c. before E. F. Esq. the commissioner, who took the same in this deponent's presence, the day of last past.

Affidavit of due taking bail before a commissioner.

Sworn, &c.

T. J.

Also it is usual for the attorney in the country to send to his agent, at the same time, an affidavit of justification.

A. B. plaintiff,
and
C. D. defendant.

In the King's Bench.

J. B. of, &c. and J. R. of, &c. bail for the defendant in this cause, severally make oath and say: and first this deponent J. B. for himself saith, That he is a house-keeper in, &c. aforesaid, and that he this deponent is worth l. and (double the sum sworn to) over and above what will pay all his debts:—And this deponent

Affidavit of justification, 2s. 6d. stamp

J. R. for himself saith, that he is a housekeeper in, &c.
aforesaid, and is worth 1. over and above what will
pay all his debts.

Sworn, &c. (a)

J. B.

J. R.

How to proceed upon receipt of the affidavit, &c.

On receipt of which, the agent files the bail-piece, with the warrant or memorandum to defend, as before mentioned in stat. 25 Geo. 3. c. 80. and the affidavit of the due taking thereof, with one of the judges of the court, for which he pays 5s. in term, and 1s. more in vacation, and gives notice to plaintiff's agent, and at the same time, he usually sends a copy of the affidavit of justification.

In the King's Bench.

A. B. plaintiff,
and

C. D. defendant.

Notice of bail and affidavit being filed by the judge,

Take notice, that the bail-piece in this cause, with the affidavit of the due taking thereof, was this day filed with the honourable Mr. Justice ——— (b) at his chambers in *Serjeants-Inn, Chancery-Lane, London*. Dated the day of 1817.

Yours, &c.

R. S. agent for the defendant.

To Mr. R. C. agent for the plaintiff.

N. B. Some practisers add the names to the notice of the bail (and the names are, &c.) it may be done either way.

Of Exception and Justification.

Exception and notice of justification.

The plaintiff's attorney may except against them the same as in *London* and *Middlesex*, within twenty days; and notice must be given of justification as before, only add the words, "by affidavit." Affidavit is to be made of the service of the notice of justification, (the names and additions of the bail are in this notice to be mentioned, and trades,) which is to be sworn before a judge, or in court: then go to the judge's clerk with whom the bail-piece is filed, and desire him to have it ready in court the day you mean to justify; pay him 2s. 6d. then make a

(a) May be sworn before the commissioner appointed to take bail, but not before the commissioner, before whom the affidavit of the caption was sworn.

(b) The judge with whom the bail-piece is filed.

brief for counsel, thus, "*Rix v. Doe. Mr. —*—to move to justify the within bail; fee 10s. 6d." Put the affidavit of justification within the brief, or have it ready to give the master; pay 9s. to the officers of the court; at night draw up the rule for the allowance, pay 7s. and serve the plaintiff's attorney or agent with a true copy.

In town as well as country causes, when the bail is completed, the bail-piece must be filed within twenty days after, by the attorney who puts it in, under the penalty of 40s. *Trin. 13 Car. 2.* If the bail is justified in court, apply to the master's clerk for the bail-piece; if justified at chambers, pay the clerk 1s. and file it with Messrs. *Provost and Chambre.*

Within what time bail-piece to be filed.

The delivery of a declaration (unless *de bene esse* before bail put in) is a waiver of the bail; and if before bail is justified, it is an acceptance of them. But if the declaration be delivered *de bene esse*, then it is only conditionally, that good bail be put in, or the bail already put in do justify. See notes on rule, *M. 8 Ann.* and *M. 10 Geo. 2. Reg. 2*; therefore do not declare in chief, before bail put in, or before justification, unless, in the latter case, you are justified with the bail.

To prevent a waiver of bail.

Taking an assignment of the bail-bond, is not a waiver of the exception. *Salk. 97. 11 East 321. Hill v. Jones.*

If the same Bail to the Sheriff become Bail above.

If the same persons who are bail to the sheriff, become bail above, and the plaintiff conceiving them to be insufficient, is desirous of a justification, he must enter his exception, and give notice as before directed, that the defendant may justify if he thinks fit, and serve the sheriff with a rule to return the writ (if this be not done previously, and which always may be done on the return day of the writ.)

How to proceed if the bail to the sheriff become bail above, to compel them to justify.

It if be already done, and the sheriff has returned *cepi corpus*, then he may serve the sheriff with a rule to bring in the body: But if the defendant neglect to justify his bail, on the day the rule expires, (or render,) the plaintiff may, the next day, move for an attachment against the sheriff for his contempt, in not obeying the last rule. And so it will be, if he does not obey the first rule. *Vide* title *Proceedings against the Sheriff*, in this case.

Rule to bring in the body expired the 21st November, 1785. No bail put in till Saturday the 19th. Notice of such bail, and to justify, was given for the 21st, being

Bail justifying after rule to bring in the body, too late.

Monday. Defendant on the *Monday* came with his bail, and the notice being deficient (*Sunday* being held as no day,) defendant prayed time for two days, which was granted; fresh notice was given for the *Wednesday*. Bail came to justify, and was opposed by Mr. *Baldwin*, who alleged that the rule to bring in the body expired on the *Monday* preceding, and that the two days granted by the rule was a surprize on the court. Mr. *J. Buller*: the first notice was short, and the rule to bring in the body expiring on the *Monday*, the court ought not to have granted the rule, for *Sunday* is no day. But if it had been for bail already put in, notice on *Saturday* to justify *Monday* would have been good. Therefore court refused to let the bail justify. *Overton's bail*, Mich. T. 26 Geo. 3.

Of filing the Bail-piece.

Bail taken before or on continuance-day, to be filed of the preceding term.

Every bail taken before or upon the continuance-day is a bail, and to be filed of the preceding term; and every bail taken after the continuance-day, is a bail, and to be filed of the subsequent term, and not otherwise; but where new bail are added to the other bail taken on or before the continuance-day, in such case the new bail shall be taken and filed as of that term in which the bail was first put in. N. on R. E. 5 Geo. 2. 1 *Salk.* 100.

If no exception to bail, how to proceed.

If no exception to bail is made within proper time, the defendant may make affidavit of the service of notice, that such bail was put in, upon the back of the bail-piece (for which oath no fee is to be taken,) and file the same with the master. R. M. 16 Car. 2.

As to justifying Bail in Vacation.

Any defendant in custody after the return of process, may in vacation justify bail before one of the justices, who may discharge him out of custody by supersedeas.

By stat. 43 Geo. 3. c. 46. Sect. 6. If any defendant shall be taken, detained or charged in custody, at the suit of any person on *mesne* process, issuing out of any of his majesty's courts of record at *Westminster*, or *Dublin*, and shall be imprisoned or detained thereon, after the return of such process, such defendant in vacation time only, and upon due notice thereof given to the attorney for the plaintiff in such process, to put in and justify bail, before any one of the justices or barons of the court out of which such process shall be issued, who may, if he shall think fit, thereupon order a rule to issue for the allowance of such bail, and may further order such defendant to be discharged out of custody by writ of *supersedeas*, or otherwise, according to the practice of such court, in

like manner, and as the same is and may be done, by an order of court in term time.

The mode of proceeding is by giving notice of justification two days : only state in the notice, that the bail already put in, will justify themselves as good bail for the defendant on day of next, at the chambers of the honorable Mr. Justice , situate in Chancery-lane, London. And the affidavit of service of such notice must be produced. The judge will make an order directing the clerk of the rules to draw up an order for the allowance of such bail ; pay for rule 8s. 6d. serve copy of same on plaintiff's attorney.

How to proceed.

As to the Bail of an Alien.

The bail in actions obtained rules against an alien to shew cause why an exoneretur should not be entered on the several bail-pieces, the defendant having been sent out of the kingdom under the alien bill, 33 Geo. 3. c. 4. the ground of which was, that no blame was imputable to them in not rendering the principal ; it does not appear in what stage the causes were. *Lord Kenyon*: The bail only engaged for the principal in the then situation of the parties: but it is now become impossible for them to render the principal, and this impossibility does not arise from any act which they could control, but from an operation of an act of parliament. These bail, therefore, to whom no fault or neglect whatever is imputable, ought not to suffer in consequence of an act which was passed for the benefit of the public. *Ashurst, J.* The plaintiffs have no reason to complain of our granting these applications, for even if they had severally proceeded to judgment, and charged the defendant in execution, he might equally have been sent out of the kingdom. Court were about to make the rule absolute; but *Bower* suggested, that they should require affidavit from the bail, that they had no effects in their hands belonging to defendant, out of which they could repay themselves in the event of the several plaintiffs recovering, and that they were not indemnified. *R. Abs.* on condition, only, that the bail produced such affidavit. *Merrick v. Vaucher, Hampe v. Same, Lazard v. Same*, 6 Term Rep. 50.

The bail of an alien may be discharged, having been sent out of the kingdom, and having left no effects to answer.

This was a similar application, the plaintiff produced an affidavit "that defendant had deposited a draft for 1000l. the amount of plaintiff's demand, on *Drummond and Co.* the bankers, with his attorney, who had indem-

But if the alien has left property, the bail must pay.

nified the bail." The court said, that the disclosure made, evinced the propriety of the distinction laid down in the former determination, and discharged the rule. *Coles v. De Hayne*, 6 Term Rep. 52.

If they try the cause.

On the trial a verdict was obtained for 1000l. Motion to exonerate the bail on payment of the 1000l. deposited, on affidavit they had no other effects in their hands out of which they could pay costs: on shewing cause, it was insisted, that as the bail had chosen to defend the action, with a view of taking the chance of a verdict in their favour, they ought to pay costs; of this opinion was the court, and discharged the rule. 6 Term Rep. 246. S. C.

If he be sent before return of writ, bail-bond to be delivered up.

The defendant having been sent out of the kingdom under the alien bill, after a bail-bond given, but before return of the writ, the court ordered that the bail-bond be delivered up to be cancelled. *Postell v. Williams*, 7 Term Rep. 511.

The court will not grant habeas corp. on application of bail to bring up the defendant in custody of a messenger, that they might render him in their own discharge.

And they refused to enter an exoneretur on the bail-piece.

The defendant being in custody of a messenger under an order of the secretary of state, for the purpose of being sent out of the kingdom by virtue of the alien act, 43 Geo. 3. c. 155. the court refused to issue an habeas corpus, on the application of his bail, to bring him up, that they might render him in their own discharge, on account of the public inconvenience and of the probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port. And they also refused while he was still in the kingdom, and might possibly be set at large again, to enter an exoneretur on the bail-piece; but they said they would remember the situation of the bail if any proceedings were taken against them in the mean time, whenever the matter was properly brought before the court again. 13 East. 457. *Folkein v. Critico*.

If a debt be contracted whilst defendant was in a foreign country, and before he became a bankrupt, no exoneration.

But this court refused to order an exoneretur to be entered on the bail-piece, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he had obtained his certificate there. It appeared that the plaintiff was resident in this country at the time of the bankruptcy. *Pedder v. M^r Master*, 8 Term Rep. 609. Had they both lived at *Hamburg*, it would have appeared that where there is a discharge by the law of one country, it will be a discharge in another. See *Co. Bankrupt Law*, 515. 4 Ed.

As to exonerating bail, and rendering, vide title *Proceedings against Bail*.

BAIL-BOND.(a)

THE bond must be made to the sheriff by his name of office, and he must therein be named sheriff, and it must be conditioned for the appearance of the party at the return of the writ, 2 *Saund.* 60. in *not.* and for nothing else. Bail-bonds need not pursue the very words of the writ: if according to the design it is sufficient. *Str.* 1155. 1 *T. R.* 240. 2 *Saund.* 60, 61. in *notis.*

As to making the bond.

An agreement in writing to put in good bail on mesne process at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the sheriff's bailiff, in consideration of his discharging the defendant, was held void. 1 *T. R.* 418. But the undertaking of an attorney may be enforced. *Id. ibid.*

As to an agreement of third person to put in bail.

Attorney's undertaking.

Proceedings thereon.

At common law, the mode of redress which the plaintiff had for the not putting in, or perfecting his bail was, to proceed against the sheriff by amercement, or to have obtained the bond from him, to sue the bail in his name, which actions the sheriff might have released.

At common law sheriff was proceeded against, if bail not put in.

To remedy this inconvenience the stat. 4 and 5 Ann. c. 16. enacts, That the sheriff, at the request and cost of the plaintiff, or his lawful attorney, shall assign to the plaintiff the bail-bond by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereon; and if forfeited, the plaintiff may, after such assignment, bring an action thereupon in his own name; and the court may, by rule, give such relief to the plaintiff and defendant in the original action, and to the bail upon the bail-bond, as is agreeable to justice and reason, and that rule shall have the nature and effect of a defeasance to such bail-bond.

How by stat the sheriff at the request of the plaintiff to assign the bond.

Court may by rule relieve.

The statute points out three things for consideration, namely,—1. The assignment of the bond;—2. The ac-

Statute points out three things.

(a) As to the bail-bond in general, see *Office of Sheriff*, 3 *Ed.* 72.; and for form and assignment of, *id.* 417—8.

tion against the principal and bail ;—3. The equitable interference of the court in giving relief.

If plaintiff rules sheriff to return the writ, may take assignment of bond.

If he accepts assignment.

If the plaintiff has ruled the sheriff to *return his writ*, and the sheriff files his return *cepi corpus*, he is at liberty to take *the assignment of the bond*, or *proceed against the sheriff* by the rule to bring in the body. (a)

In case the plaintiff has accepted the assignment of the said bond, he cannot then proceed to rule the sheriff to return the writ (unless the bond be void.) 1 *Wilson*, 223. *Ladbrook v. Stone*.

When an Assignment may be taken.

Bonds ats. the king.

By stat. 48 Geo. 3. c. 3. bail-bonds taken where the person is arrested at the suit of the king may be assigned to the king.

Four days after return of writ in London and Middlesex.

In *London* or *Middlesex*, no bail-bond can be put in suit until *four* days after the return of the writ. And *within* that time all proceedings upon the bail-bond to the sheriff shall stay. R. M. 8 *Anne*.

In any other county or city, six days.

In any other *county* (or *city*) the defendant shall have leave *six* days to put in good bail, without any prosecution whatsoever to be made in the mean time on the bail-bond to the sheriff. *Ibid.*—The *four* and *six* days are reckoned *exclusive*. If either the *fourth* or *sixth* day falls on a *Sunday*, the defendant has the *Monday* following to put in bail, and the bond cannot be put in suit until *Tuesday*. 2 *Str.* 914, 782. *Bullock v. Lincoln*.

Sunday.

If rule be to set aside the proceedings for irregularity and proceedings to stay.

In case a rule be obtained to set aside the proceedings for irregularity, on the insufficiency of the affidavit to hold to bail, and all proceedings in the mean time to stay, the defendant has the *same time* to put in bail *after* the rule is *discharged*, as he had *before* the motion made, 4 *Term Rep.* 176. *Swayne v. Crammond*, the proceedings being totally suspended by an act of the court.

Taking the assignment of bond is a voluntary act.

The taking an assignment of the bail-bond is a voluntary act of the plaintiff, therefore he should be well satisfied of the *responsibility* of the bail, for by making his

(a) And now when he has ruled the sheriff to bring in the body, before the motion for an attachment, he may take the bond. *Mr. J. Grose* determined this point, *Mich. Vac.* 1807; but by this he releases the sheriff.

election to take the bond, he thereby *discharges* the sheriff, and cannot afterwards resort to him either to return the writ, or bring in the body. 1 *Wils.* 223. *Salk.* 99. *Lord Ray.* 722.

If the bail above is not duly put in, or if put in and excepted to, they do not justify within the time limited by the rules of the court, the bond is forfeited; and the plaintiff may take an assignment of it, or proceed against the sheriff at his election. If the action be in *Middlesex*, apply to the under sheriff at his office in Bedford-street, Bedford-row; if in London, at the secondaries office, 57, *Coleman-street*, for the assignment of the bond; either of whom will, by indorsement on the back of the bond, assign it to the plaintiff. Pay 5s.

When bond is forfeited, plaintiff may then take assignment.

How to obtain the assignment in town.

But if the writ be directed to the sheriff of *Surrey*, *Essex*, or *Kent*, then apply to the sheriff's agents in town.

Surrey, Essex, and Kent.

In any other county, apply to the under sheriff, who sends the same to his agent; the usual charge is 6s. 8d.

Other counties.

The sheriff may assign the bond in any county. 1 *Str.* 727. *Gregson v. Heather.* *Ld. Ray.* 1455. *Fortesc.* 366.

Assignment by sheriff.

An exception was taken on the 16th *June*, and the bail not having justified pursuant to notice on the 20th, (being the last day of *Trinity-term*) the plaintiff took an assignment of the bail-bond on that day, after the rising of the court: the court held it regular, and said this case is distinguishable from the general case where the plaintiff cannot take such assignment before the expiration of the fourth day. *Dent v. Weston*, 8 *Term Rep.* 4. *Wilson v. Leece*, S. P. stated by the master. *Ibid.*

If the 4th day for justifying bail be the last day of term, must justify that day, or bond may be assigned.

A bail-bond may be assigned before it is forfeited, but it cannot be put in suit until after forfeiture. See *Barnes*, 77.

Bond may be assigned before it is forfeited.

Of the Action on the Bond.

I have already stated that no action can be brought on the bond unless the same be forfeited; nor can any writ be sued out by the plaintiff until the assignment of such bond is stamped with a proper stamp, namely, a stamp of 2s. 6d. For which purpose you are to take the bond to the Stamp-office, and the clerk writes over the assignment in red ink, the day of the month and year when stamped.

Bond to be stamped.

It is to be observed that neither the principal, or bail

Not to be held to special bail.

are to be held to special bail, in this action, for that would occasion bail *ad infinitum*.

Writ to be sued out in same court where the original action is.

When the assignment is stamped, you then sue out one or more writs against the principal and bail, in the same court where the original writ against the defendant issued, for that court only hath jurisdiction and cognizance of the action. *Walton v. Bent*, 3 Burr. 1923. 8 Term Rep. 653. *Donnaty v. Barclay*. S. P. So if a bail-bond be given in a court of the county palatine.—*Chesterton v. Middlehurst*, 1 Burr. 642.

The reason.

The reason for this is founded on the construction of the act of parliament, because the court is empowered to give a general relief to both parties in the original action, on equitable terms, which no other court can properly do, as they cannot judge of the merits. *Black. Rep.* 289. 3 *Wilson*, 348.

If the sheriff bring action.

But if the sheriff bring an action himself on the bail-bond, he may bring it in a different court than that in which the original action was. 1 *H. Black. Rep.* 631. *Newman v. Baker*.

How plaintiff to be styled in action on bond.

The plaintiff in the action on the bail-bond assigned, is generally named assignee of the sheriff. And it seems he may lay the venue in any county. *Str.* 727. *Ld. Ray.* 1455. *Gregson v. Heather*.

May be sued by executor.

And if the bond be assigned, and plaintiff afterwards die, it may be sued by his executor. *Pract. Reg.* 68. *Nott v. Stevens*.

Terms on which the Proceedings on Bond will be stayed.

General rule as to staying proceedings.

It may be taken as a general rule, that proceedings on the bail-bond (although regular) will be stayed in all cases, where the plaintiff can be put in as good a condition as he would have been in, provided the defendant had been guilty of no laches,

The terms.

The court in these cases, will after the bail are perfected, stay the proceedings in case "no trial be lost, up—
"on payment of the costs incurred by taking the assign—
"ment of the bond, to be taxed by the master, receiving a
"declaration in the original action, and if necessary taking
"short notice of trial for the last sittings in term, or giv—
"ing judgment of the term."

If a trial be lost, the terms

But wherever the defendant is guilty of a neglect, in not perfecting his bail, and applying to stay the proceed—

ings on the bond, so that the plaintiff has lost a trial, the court in this case require an affidavit of merits, and that the bail consent " that the bond shall stand as a security for the debt and costs, if the plaintiff recovers the original action."

But if the plaintiff was not at the time of the application made to stay the proceedings, in a condition so as to have gone to trial within that term, the court then will not impose the latter terms on the defendant, but will order a stay of the proceedings on payment of the costs only. But such costs must be immediately on the taxation paid to the plaintiff's attorney ; as no proceedings can be staid but on compliance with the terms imposed by the rule.

If plaintiff was not at time of application made in a condition to have gone to trial.

These applications in term time must be made by motion in court ; in vacation, by summons before a judge. And here it is to be observed, that the affidavit on which the motion is to be made, is to be intituled in the original action, and not in the actions against the bail.

In term time application to the court, in vacation to a judge.

The bail may now render the principal although the bond be assigned before any justification ; and may move to stay the proceedings against them on payment of the costs. 5 Term Rep. 534. *Meysey v. Carnell*.

Before justification if bail render, may move to stay proceedings.

How to proceed.

Whenever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in case the party means to put in bail in order to stay proceedings on the bail-bond) should be, that he will put in and perfect bail on such a day, and in that case the plaintiff may oppose the bail in court, without its being a waiver of the bail-bond. *Boldero v. Gray*, Cow. Rep. 769.

After default in not putting in special bail in time, it is not sufficient to put in bail afterwards: they must be justified though not excepted to, or plaintiff may take an assignment of the bail-bond. 7 East. 607. *Turner v. Cary and others*.

After default in not putting in bail.

Immediately on the bail being served with process, give notice to put in and perfect bail (two days notice, as Monday for Wednesday) on the same day bail is perfected, move the court to stay the proceedings (on an affidavit that bail are put in and justified) on the bail-bond against

How to proceed.

the bail on payment of costs, add, that in the mean time all proceedings be staid.

It is a rule *nisi*, draw up the rule for allowance of the bail with the rule *nisi*, and serve them both together: then proceed afterwards to make the *latter* rule absolute, on an affidavit of service; get the costs taxed, and pay same, otherwise plaintiff may still proceed.

Vacation.

But if it is in vacation time, then put in and perfect bail, and apply to a judge for a summons to stay the proceedings against the bail on the bond, on payment of costs; if the judge makes an order, proceed to tax the costs, and pay same.

Notes of Cases.

The bond shall stand as a security, although no proceeding on the original action for two terms.

Writ was returnable in *Easter term*, bail-bond taken, and no proceedings thereon till *October 24*, when the bond was assigned, and special bail was put in the next day. It was insisted that plaintiff ought to have delivered a declaration *de bene esse*, and thereby quickened defendant. But the court held, he was not bound so to do, and that defendant was in the first fault, whereby plaintiff lost a trial; so defendant was forced to let the bail-bond stand as a security. *Str. 1262. Merryman v. Carpenter.*

The plaintiff had proved his debt under a commission, as bail was not put in pursuant to the condition of the bond, the plaintiff taking the assignment (although two terms had elapsed) was held good.

The defendant was on the 18th of *July 1783*, arrested on a bill of *Middlesex*, returnable on *Thursday* next after the morrow of *All Souls*, and gave bond; he became a bankrupt before the return of the writ, and the plaintiff the 12th of *August* proved his debt: the defendant did not put in bail above, as he ought, *four days after the return*, nor did the plaintiff proceed by filing a declaration; the defendant not having obtained his certificate, plaintiff 30th *April 1784*, took an assignment of the bond, sued out and served writ thereon, and declared 1st *May*. Defendant laid these facts before the court, and moved to set aside the proceedings. Upon shewing cause, it was alledged, that the case in 2 *Str. 1262*, was in point; and on the part of the defendant it was contended, that the plaintiff not having delivered a declaration *within two terms*, he was out of court, and therefore ought not to take the bond; and that by his having proved his debt under the commission, he had waved all proceedings. But the court held, that nothing was a performance of the condition of the bond, but putting in bail above, and discharged the rule. *Carmichael v. Chandler.*

What performance of the bond.

Bail were put in on the 22d Nov. 1794; exception on the 23d, and the bail were not justified.—The plaintiff took the bond on the 7th *January*, and on the 21st of same month, the bail not having justified, surrendered the principal. “Rule why the proceedings on the bond “should not be stayed on payment of costs”—on shewing cause, the case of *Harrison v. Davis*, 5 *Bur.* 2683, was cited. *Curiam*. The practice now settled is in favour of the present application on payment of costs; for that the plaintiff had the body of the defendant, which is all that he could have had, if the bail had justified before they had surrendered the principal, and therefore there was no injury done to the plaintiff. *Rule abs. Meysey v. Carnell*, 3 *Term Rep.* 554. 6 *Term Rep.* 753. *Jones v. Lander*.

Proceedings stayed on the bond on payment of costs, though the bail surrender the principal without having justified.

Defendant was arrested upon a writ returnable in Trinity term, 1811, and gave bail to the sheriff. Bail above were put in and excepted to, but not further proceedings were taken until 13th *January*, 1812, when an assignment of the bail-bond was taken; and on the 16th *January*, a writ was issued against the bail to the sheriff; on the 21st of *January*, the defendant was surrendered in discharge of his bail, and upon motion the court stayed the proceedings upon the bail-bond upon payment of costs, stating that the plaintiff having the body of the defendant, had got the greatest security he could require. *Hil.* 1812. *Anon*.

Motion to stay proceedings on the bail-bond on payment of costs, and the sum sworn to, (*E. T.* 1774,) it appeared by the plaintiff's affidavit, that he might have proceeded to trial the sittings “after last Hilary term,” that defendant did not die “until after that time.” *Cur.* held the practice to be, that where the plaintiff might have had judgment against the original defendant, the bail below are liable for the whole debt and costs, and here he might have had such judgment. Rule discharged. *Orton & al. assignees v. Vincent et al. bail of Bedford, Corp.* *Rep.* 71.

Where plaintiff might have had judgment against the principal, bail are liable on the bond, though he die.

But where the defendant dies before the plaintiff could have had judgment against him, if there has been no delay in putting in and perfecting bail, the court will relieve the bail on payment of costs only. *Ibid*.

If defendant dies.

If writ be returnable at a day out of term, the bail-bond taken on it is void, and that without plea. *Str.* 399. *Mills v. Bond*. Therefore may be set aside on motion.

When bond is void.

It is sufficient to state in the condition, the names of the

What is necessary to

state in condition of bond.

parties, and the time and place of defendant's appearance; if the cause of action be added, as a plea of trespass, instead of a plea of trespass on the case, such bond is good. Owen v. Nail, 6 Term Rep. 702.

If Defendant returns into Sheriff's Custody.

Bail-bond may be cancelled before the return of writ, if party return into the sheriff's custody.

If the party return into the sheriff's custody, before the return of the writ, the bail-bond may be cancelled, and considered as if it had never been given; the great object being to compel an appearance at the return of the writ: and whilst in custody the plaintiff may proceed to judgment and not suffer him to be superseded. The stat. 4 Ann only meant, that the sheriff should be compelled to assign such bail-bonds as were effectual. *Stamper v. Wilbourne, 7 Term Rep. 122.*

After sheriff has taken a bond he may choose whether he will or not accept a surrender of defendant.

After a defendant has been discharged out of custody upon a bail-bond, it is neither in the power of the bail to render him, nor of the party to surrender himself again into the custody of the sheriff, before the return of the writ, without the consent of the latter; he may rest upon the security of the bail-bond, and insist upon the bail performing the condition of it. *Lord Kenyon. Hamilton v. Wilson, 1 East, 390. See Jones v. Lander, 6 Term Rep. 753. 1 Bos. & P. 325.*

If an attorney give an undertaking to an officer, court will proceed in a summary way.

An attorney gave his undertaking to the sheriff's officer, to give a bail-bond to the sheriff in due time, which he afterwards neglected to do, and the plaintiff recovered against the sheriff for an escape. It was held, that such an undertaking being contrary to the statute of 23 H. 6. c. 9. the court would not proceed summarily to make him pay the debt and costs, for his breach of faith, on an application made on the part of the officer. *Sedgworth v. Spicer, 4 East 568.*

If principal die between arrest and return day.

If an assignment be made, and proceedings even to judgment and execution against the bail, where the principal died, *between the arrest and the return day of the writ*, the court will set same aside. *Hutchinson v. Smith, 8 Mod. 240.*

So after death of defendant, if bond be assigned.

So if the bail-bond be assigned, *after the death of the original defendant*, the court will stay the proceedings against the bail. But if it appears that the plaintiff knew not of the death of the principal, they shall pay costs. *Kingston v. Holloway, 1 Com. Dig. 492. 374.*

If a defendant be sent out of the kingdom, under the alien bill, after he has given a bail-bond, and before the return of the writ, court will order the bail-bond to be delivered up to be cancelled. *Postell v. Williams*, 7 Term Rep. 517.

If defendant be sent out of the kingdom under alien act before return of writ.

According to the established practice, if the principal be surrendered in time, but no *regular notice* has been given of it to the plaintiff, who thereupon proceeds against the bail on the bond, the bail are entitled, of course, to be relieved upon payment of all the costs incurred by their own laches. There is no distinction in this respect, whether the application be made *before* or after *execution issued*; but the longer the delay, the more costs they will have to pay. It appeared that the money was levied against the bail, and in the hands of the sheriff. The rule to set aside the proceedings on the bail-bond on payment of costs made absolute. *Lepine & al. executors, v. Barratt*, 8 Term Rep. 222. and see 10 East, 100. *Plimpton, assignee, &c. v. Howell and another*.

Bail may be relieved against any proceedings on the bond, on payment of costs, though the money be levied and in the sheriff's hands. The principal was rendered in time but no notice given.

If the Bond be assigned irregularly, how to proceed,

If the bond be irregularly assigned, move the court to set the proceedings aside for irregularity, upon an affidavit stating the particular facts, the writ having issued returnable on, &c. defendant's arrest, bail being put in above on such a day, and notice given, that the bail were served with writs returnable, &c. and that the bond was assigned such ad ay. (a)

How to proceed if irregularly assigned.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in *abatement*, but in *chief*, *Salk*. 519. Nor will the court order the bond to be delivered up to be cancelled, on the ground of a *misnomer*. 3 Term Rep. 572. *Salter, qui tam, v. Shergold*, though he swears he was not the person.

Cannot plead in abatement.

The irregularity may be in the *writ*, as a bad return, in the affidavit or in the arrest, exception to the bail, or to the bond itself, or that it was put in suit *before it became forfeited*: in either of these cases the irregularity must be stated in the affidavit, and a copy of the writ itself, if that is complained of, should be annexed, so if the affidavit to hold to bail.

If irregularity in the writ or affidavit to hold to bail, &c.

(a) The affidavit is to be intitled in the original action. *Barlowe v. Kaye*, 4 Term Rep. 688.

SHERIFF. (a)

Of the Proceedings against the Sheriff to compel him to return the Writ, and bring in the Body.

It appears by the 13 *Edw.* 1. c. 39. and 23 *H.* 6. c. 10. that sheriffs of the different counties were very tardy in returning their writs in due time; and by the former statute it is ordained, "that a complaint should be made to the justices, and a writ should go unto them to inquire whether such writ was executed or not; and if executed, and not returned, the demandant should have his damages awarded."

By the latter, "if sheriffs return upon any person, *cepi corpus*, or *redidit se*, they shall have the bodies at the return of the said writ."

By rule, *Easter*, 6 *Jac.* 1. "Every sheriff shall, after term, return into court all writs, and in default expect judgment for contempt."

Notwithstanding which, sheriffs, bailiffs of liberties, and their deputies, delayed execution of process, and return thereof; for preventing of which, a rule was made in *Mich.* term, 1654, whereby the court ordered, "if it should appear that any such officer should wilfully delay the execution, or return of process, or execution, or having levied money, should detain it after the return, besides the ordinary course of amerciamment, &c. an attachment, &c. should be as the case requires."

Special bailiff appointed, sheriff need not return his writ.

If a *special bailiff* be appointed on the nomination of the plaintiff, the *latter* must take the consequence of the act of the former: therefore the plaintiff cannot call on the sheriff to return his writ; if he should, the sheriff may move to discharge the rule. *De Moranda v. Dun-kin*, 4 *Term Rep.* 119.

Responsible after arrest, and bond.

But the sheriff is even in such case responsible for the defendant after an arrest made and bond given. *Taylor v. Richardson*, 8 *Term Rep.* 505.

If the defendant deposit the sum sworn to with the sheriff, without taking a bail-bond, the court will not permit defendant to file common bail on payment of such

sum, if the plaintiff have any claim on him *beyond that sum*. *Stevenson v. Cameron*, 8 Term Rep. 28.

Ordered, that unless every sheriff shall return every writ issuing out of this court directed to him, and bring into court the body of every defendant taken by virtue of such writ, within "six days next after the service of a rule of this court upon such sheriff, or his under sheriff," for the returning any such writ, or bringing into court the body of any such defendant, an attachment shall issue against such sheriff, without giving a day to shew cause against such attachment. *R. T. 5 & 6 Geo. 2.*

Sheriff to return writs and bring in the body within six days.

Ordered, that every rule to be made for the sheriff of *Middlesex* and the sheriffs of *London* to return writs, or to bring into court the body of any defendant, be made for such sheriff; &c. *to return such writ*, and *bring into court the body* of such defendant, &c. within *four days next after service thereof*.

Sheriffs of London and Middlesex to return writ and bring in the body in four days.

N. B. This rule made no alteration as to other cities, towns, and counties, therefore they have *six days* as heretofore, by *R. T. 5 & 6 Geo. 2.*

Ordered, that the *custos brevium* shall indorse on every writ, on what day, and at what hour, the same was filed. *R. T. 30 Geo. 3. 3 Term Rep. 387.*

Custos brevium to mark writs.

Ordered, that in future all writs shall be returned to the sheriff on the day on which the rule for returning the same shall expire; and in default thereof, the plaintiff shall be at liberty to move for an attachment on the *next day*. *R. M. 32 Geo. 3.*

Sheriff to return the writ the day on which the rule expires.

The rule to return the writ is made on the sheriff peremptorily to return the same, within the time specified. So is the rule to bring in the body of the defendant. *The rule.*

If the plaintiff be dissatisfied with the bail taken by the sheriff, he may, upon the *return day* of the writ, get a rule from the clerk of the rules to return the same; pay 6s. 6d., (a) serve copy on the deputy secondary (if in London,) at the office, No. 28, Coleman-street, London: if in *Middlesex*, at the sheriff's office, on Mr. Burchell; *shew the original rule* (on which copy put the officer's name who arrested the defendant,) and at the expiration of the rule, go to the treasury chamber, *Westminster-hall*, *How to compel to return the writ.*

(a) *Durham, Chester, Lancaster, and the Cinque Port, 7s.*

search the *custos brevium* there for the return of the writ; if the same is not returned, then move for an attachment against the sheriff upon this affidavit.

Rule to return the writ.

On next after in the year of king Geo. 3.
 A. B. } It is ordered, that and sheriffs of Lon-
 and } don, shall within *four days(a)* next after notice
 C. D. } of this rule to be given to their secondaries (or
 that sheriff of the county of shall within *six*
days(a) after notice of rule to be given to his under she-
 riff) peremptorily return the writ of issued between
 the parties. *By the Court.*

The clerk should, at the *time* of the *service* of the above rule, take the name of the person on whom he served it at the office, to insert in his affidavit of the service; and should also have the term in which the writ is *returnable* with him, as he is to make search of *that term*, with Mr. *White*.

Affidavit of service of the rule and search at the *custos brevium*.

A. B. of, &c. maketh oath and saith, that he did on the day of instant, personally serve Mr. *Burchell*, who is, or acts as deputy sheriff of the county of *Middlesex*, with a true copy of the rule hereunto annexed, and at the same time shewed him the said original rule.(b) And this deponent further saith, that he did this morning search, with the *custos brevium* of this honourable court, for the return of the bill of *Middlesex* issued in this cause, but the same was not filed with him.

If *latitat*.

If it be a writ of *latitat* then say, for the return of the writ of *latitat* issued in this cause, but no such writ was *then filed there*.

If rule served on the secondary.

A. B. of, &c. maketh oath and saith, that he did on the day of instant, personally serve Mr. *Collingwood*, who acts as deputy to the secondaries of the city of London, at their office, No. 28, Coleman-street, with a true copy of the rule hereunto annexed, (as before.)

(a) In London and Middlesex it expires in four days, and in six days in any county or city. 2 *Saund.* 61, d. n. 7.

(b) These words are held to be essential. *Rex v. Smithies*, 3 T. R. 351.

If the rule should be served on a clerk in the office, If served on a clerk.
 say, that he did on the day of serve
 Mr. *Collingwood*, who acts as deputy to the secondaries of *London*, at their office, No. 28, Coleman-street, with a true copy of the rule, hereto annexed, by delivering a copy of the said rule to A. B. a clerk in the said office of the said deputy secondary, and at the same time shewed to him the said original rule,

A, B, of, &c. maketh oath and saith, that he did on If served on
 the day of instant, personally serve under sheriff
 Mr. who is the under sheriff of the county of in country.
 with a true copy, &c.

If the sheriff on the rule returns his writ *cepi corpus*, Election of the
 the plaintiff has it in his election, in case no bail is put in, plaintiff to
 in due time, either to take an assignment of the bond, proceed by
 or rule the sheriff to bring in the body. But if he takes taking out the
 the assignment of the bond, he discharges the sheriff. second rule or
 the bond.

As the object of this rule is to bring the sheriff into As to the ser-
 contempt, it must be served *personally* either on him or vice of the
 his under sheriff. Service on the under sheriff's agent in rule.
London has been held to be insufficient; for as six days
 are allowed after the service of the rule to return the writ,
 it might be impossible to obey the rule in distant coun-
 ties if service on the agent were sufficient. *Rex v. Coles*,
Dougl. 420. But in *London*, *Middlesex*, and *Surrey*, a
 service on the under sheriff's agent is held to be sufficient;
 and the reason assigned is, because the officers of the
 agents for the under sheriffs of those counties are considered
 as the officers of the under sheriff's themselves; but in
 these cases if the rule be served on the agent any where
 except *at the office*, the service will be bad. *Id. ib.*

If the rule expire on the last day of the term, the sheriff When sheriff
 is attachable at the rising of the court on that day, if no may be at-
 return be made before. 11 *East*, 591. tached in
 vacation.

Where the rule expires in vacation, the sheriff need If rule ex-
 not return it till the first day of the ensuing term, and pires in vaca-
 has the whole of that day to file his return. 5 *East*. 386. tion.

How to compel Sheriff to bring in the Body.

It is settled that the rule to return the writ, and bring Rules must
 in the body, must keep pace with the defendant's time to keep pace
 put in bail; (a) therefore if he has four days to put in bail, with the de-
 fendant's time
 to put in bail.

or six days, the rule to bring in the body cannot be taken out until the four or six days are expired, for the putting in bail above by the defendant; but if the defendant does not put in his bail in due time, (according to the limited time,) and the sheriff has returned his writ *cepi corpus*; a rule to bring in the body in that case, may be obtained the next day and served.

When sheriff
to be ruled.

The sheriff cannot be ruled to bring in the body until the time for putting in bail has expired. 8 *East*. 525. *Rex v. The Sheriff of Middlesex*.

The sheriff may be ruled to bring in the body on the same day that he returns *cepi corpus*, if the time for putting in bail has expired. *The King v. the Sheriff of Middlesex, in the case of Pouch ee v. Lieven*.

If bail be put
in in due time.

Therefore if bail is put in, in due time, the writ being returned *cepi corpus*, first except against them, (b) and serve notice thereof, then obtain the rule to bring in the body from the clerk of the rules; pay 6s. 6d.; serve the under-sheriff as before with a copy, and shew the original rule; if the bail are not justified in due time, viz. on the expiration of the rule, the next morning, make affidavit of the service thereof, and move the court for an attachment; fee to counsel, 10s. 6d. Indorse on the affidavit, "to move for attachment against the sheriff of "Middlesex for not bringing in the body, pursuant to the "rule annexed."

Sheriff to save
himself may
put in bail.

The sheriff to save himself on receipt of the rule to bring in the body, may put in bail for the defendant against his consent, and justify same. For *Lee*, C. J. said, the sheriff must either bring in the body, or justify good bail in court, for the plaintiff is not concluded by his having taken a bail-bond. *Wolfe v. Collingwood*, 1 *Wils*. 262. The sheriff takes bail at his peril upon the stat. H. 6. *per Denison*, J. *Ibid*.

If rule to
bring in the
body be served
the last day
of term, the
bail have to
justify till the
first day of
next term, and
an attachment
moved that
day will be set
aside.

Writ returnable 23d Nov. 1800, bail put in 27th. Rule to bring in the body was served 28th, so that the bail had the whole of the first day of next term to justify. On that day, defendant surrendered, but no notice till 8 in the evening, and on the same day an attachment issued against the sheriff. The court were of opinion, that as the bail had the whole of that day in which to justify, a

(b) The bail must first be excepted to before this rule can be had; and there is no difference between the original and added bail. *Rex v. Sheriff of Middlesex*. 8 *Term Rep*. 258.

surrender of the defendant on any part of that day justified the sheriff, and made rule absolute for setting the attachment aside. *Rex v. Sheriff of Middlesex*, 8 Term Rep. 464.

The writ of latitat was returnable the 1st June, 26 Geo. 3. in a country cause, sheriff ruled to return it 2d.; the 8th he returned *cepi corpus*, upon which the plaintiff on same day served him with a rule to bring in the body, and on the 15th obtained an attachment; the court held the proceedings to be regular; although it was objected, that the sheriff had all the 8th to return the writ, and that the rule to bring in the body should not have been served till the 9th: for in this case, the time for putting in bail had expired, before the service of that rule. *Par-ker v. Wall*, M. 26 Geo. 3.

If bail be not put in in due time, the rule to bring in the body may issue same day rule to return the writ expires.

On the 19th of November, being the return day of the writ, a rule was taken out to return it, which expired the 23d, Saturday; that morning, the sheriff filed his writ and return *cepi corpus*; on the evening of the same day, the sheriff was served with a rule to bring in the body. It also appeared that on the 23d of November notice of bail was given; after the service of the rule to bring in the body, and on Monday the 25th they were excepted to; on the 26th notice of other bail was given to justify the first day of this term, being Hil. 34 Geo. 3. On the last day of the last term, an attachment was granted for not bringing in the body: rule to set aside the attachment for irregularity, on the ground that the plaintiff ought not to have ruled the sheriff to bring in the body until the 24th, the day after the expiration of the rule to return the writ. Court said, the sheriff had the whole of the 23d to return the writ, and that of course he could not be attached for not obeying the rule, which ought not to have issued. *Rule abs. Hutchins v. Hird*, 5 Term Rep. 479.

Sheriff ought not to be ruled to bring in the body till the day after the expiration of the rule to return the writ: if he be attached for not obeying the rule, the court will set aside the attachment for irregularity.

Special capias by original, returnable. 25th Nov. 1801. On the 26th the rule was served to return the writ, the 27th, the sheriff returned *cepi corpus*; 2d December bail was put in, being in due time. Notice of exception given on the 7th Jan. 1802, the rule was served to bring in the body, bearing teste the 27th Nov. being the day the sheriff returned *cepi corpus*; 23d January the bail attended and were rejected, and notice of adding and justifying was served for the 26th. On the 25th an attachment was granted against the sheriff, and rule served on defendant's attornies, the 26th, and the attachment afterwards issued, and on the same day bail were added, but

A rule to bring in the body, tested on the day of the return by the sheriff of *cepi corpus*, though issue in the vacation is irregular.

did not attend to justify. On 27th bail justified, but no motion to set aside the attachment till the first of Feb. *Mr. J. Grose*. The question is, whether the rule to bring in the body, being served in vacation, but appearing on the face of it to be made before the return of the sheriff of *cepi corpus*, be regular? and we are of opinion, that for the sake of congruity upon the face of the proceedings, the rule to bring in the body, which from its nature ought not to be made till after the return of *cepi corpus*, is irregular, if it appear upon the face of it to have been made before such return. Rule to set aside the attachment also. *The King v. Sheriffs of London*. 2 East, 211. The clerk of the rules should not have granted the second rule in vacation, knowing it to be regular.

Sheriff's bail
may take de-
fendant and
surrender him.

A sheriff's officer not having taken a bail-bond on an arrest, prevailed on two persons to become bail, which they did, they then took defendant for the purpose of surrendering him (the defendant knew not the bail) and two persons opposed them, and defendant escaped. *Lord Kenyon* said, they had a right to surrender him. They were his bail, and whether with or without consent was immaterial; they had still the right, and they told him they were come for the purpose of surrendering him. If he resisted them, it was at his peril, it would be so even in the case of death; and had either of the bail been killed, all the defendants would have been guilty of murder. *Rex v. Butcher & al. Peake's N. P.* 169.

A. B. plaintiff,
and

In the King's Bench.

C. D. defendant. (a)

Rule to bring
in the body.

next after in the year of king *Geo. 3.*
A. B. } It is ordered, that and sheriffs of
v. } London, shall within *four days* (b) next after
C. D. } notice of this rule to be given to their secondaries (or that sheriff of the county of shall within *six days* (b) next after notice of this rule, to be given to his under-sheriff) peremptorily bring into court the body of the defendant.

By the Court.

(a) The affidavit must be intituled in the cause, and also the court must be named. 3 *Term Rep.* 253. See title *Affidavits*.

(b) Four days in London and Middlesex, and six in any county or city. 2 *Saund.* 61, d. n. 7.

J. T. clerk to S. R. of gentleman, attorney for the plaintiff in this cause, maketh oath and saith, that he did on the _____ day of _____ instant, personally serve Mr. _____ with a true copy of the rule hereunto annexed, and which said Mr. _____ is or acts as the deputy^b to the secondaries of the city of London, at their office, 28, Coleman street, and at the same time shewed him the said original rule; and this deponent further saith, that no bail above has been put in for the said defendant in this cause.

J. T.

Sworn, &c.

Affidavit of service of rule to bring in the body to move for an attachment.

^a If in Middlesex, say, "Mr. Burchell, or Mr. _____"
^b deputy sheriff of the county of Middlesex.

The attachment is a criminal process directed to the coroner, when it issues against the present sheriff, or when against the late sheriff, to his successor; it must be made returnable on a day certain, and may be moved for on the last day of the term. 1 Burr. 651. And until it be granted the proceedings are on the civil side of the court; at the foot of the attachment is placed the names of the plaintiff and defendant; as *Dix agst. Rich.* But when granted, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. *Wood v. Webb*, 3 Term Rep. 133. 7 Term Rep. 439. And affidavits to set aside an attachment (though not issued) in the course of a civil suit must be intituled, "The king against the party to be attached, as against the sheriff of Middlesex," 7 Term Rep. 439.

Attach. a criminal process.

Affidavits to set aside attachment how intituled.

In the evening get the rule of the clerk of the rules for the attachment, carry it to the crown-office; one of the clerks there makes out your attachment; pay 18s. 6d. N. B. No one particular clerk in court does this, therefore the general rule is, to take your own clerk in court.

next after _____ in the _____ term, in the _____ year of king Geo. 3.

A. B. } Upon reading the rule, made in this cause
v. } on next after _____ in _____ term last,
C. D. } and the affidavit of E. F. it is ordered that a writ of attachment issue against the sheriff of the county of _____ for his contempt, in not bringing into court the body of the defendant, pursuant to this rule, upon the motion of Mr. _____

Rule for attachment.

By the Court.

Geo. 3. &c. To the coroner of the county of _____ greeting. We command that you attach C. D. Esq. sheriff of our said county, so that you may have him before us, on _____ to answer to us, for certain tres-

Writ of attachment.

passes and contempts by him lately done and committed in our court before us; and have there then this writ Witness, &c.

Lushington.

By rule of court, E. F. Clerk in Court.

Affidavit for attachment where bail is put in, but not justified.

And this deponent further saith, that the said defendant did put in bail above in this cause, but hath not justified the same.

How to proceed.

When you have got attachment from the crown-office, make out bill of costs, adding the fee of 2l. 2s. and 2s. 6d. for the warrant, take same to the coroners, if in *London*, Mr. *Shelton, Old Bailey*; if in *Middlesex*, Mr. *Unwin of Shadwell*, or Mr. *T. Stirling, of Clerkenwell*, who will grant a warrant thereon.

May rule the coroner.

Upon the return, if he does not pay the money, you may have a rule for him to return the writ of attachment, which get at the crown-office, and serve him with a copy; if he does not return it, make affidavit thereof, and the court on motion will grant an attachment, and order it to be directed to two elisors, being two or more persons named for that purpose by the master.

What affidavit to support rule for attachment must state.

An affidavit to support a rule for an attachment of contempt, must state personal service, and that the original rule was shewn at same time. *The King v. Smithies*, 3 *Term Rep.* 351.

When an attachment may be moved for.

If the rule for the allowance of the bail be not served, an attachment may be moved for. *Rex v. Sheriff of Middlesex*, 4 *Term Rep.* 493. *Vide title Special Bail.*

Plaintiff may abandon the attachment against sheriff.

The plaintiff may abandon an attachment obtained against the sheriff, and take an assignment of the bail-bond, and proceed thereon. *Pople and another v. Hyatt*, 15 *East.* 215.

When attachment irregular.

An attachment against the sheriff, for not bringing in the body after the defendant has surrendered is irregular, though the surrender be not made until after the rule for bringing in the body has expired. *Rex v. the Sheriff of Middlesex, in the case of Henderson v. Van Wride*, 2 *Maule and Selw.* 562.

What court requires previous to setting aside a regular attachment.

The court upon application to set aside a regular attachment against the sheriff for not bringing in the body, will require either an affidavit of merits, or that the application is made on behalf of the sheriff, or the bail, without collusion with, or indemnity from the defendant. *Rex v. the Sheriff of Middlesex, in the cause of Gee v. White*, 3 *Maule and Selw.* 299.

Such affidavit being made by the bail, the rule was made absolute.

How to proceed against the late Sheriff.

By the stat. 20 Geo. 2. c. 37. s. 2. "No sheriff shall be liable to be called upon to make a return of any writ, or process, unless he be required so to do, within six months after the expiration of his office." The months are *lunar* months; the day of the sheriff quitting his office is to be reckoned as one, *Dougl.* 463; and that he cannot be ruled to return the writ, after the six months, though requested before. 2 *Term Rep.* 1. *Rex v. Jones.*

Sheriff not liable to be called on, after six months to return his writ.

A rule was issued three days previous to *Michaelmas* term, and intituled of that term; the sheriff did not obey the rule; an attachment was granted, and the court set it aside as irregular and improper. *Rex v. Sheriff of Cornwall*, 1 *Term Rep.* 552.

A rule to return writ previous to term is bad.

The sheriff being ruled to return the writ either does or does not return it. If there be no return, it is a contempt of the court; for which the constant course of proceeding is by attachment, whether against the present or late sheriff. For as to the late sheriff, he ought in strictness to have returned the writ, before he went out of office, and therefore the contempt was actually committed whilst he was a servant of the court. *Dougl.* 464. *The King v. Adderley.*

As the sheriff is not bound to return his writ after he has been six months out of office, therefore if he is out of office, before you call on him for a return of the writ, you may within six months get a rule upon him (naming him as the late sheriff) to return the writ, which is to be served at the same office as before mentioned if in *London* or *Middlesex*, in the country his under-sheriff; and if he returns *cepi corpus*, then in order to compel him to bring in the body, you may have a rule for that purpose.

How to proceed if sheriff out of office.

It is ordered, that from and after the last day of this term, where any sheriff before his going out of office shall arrest any defendant, and *cepi corpus* shall be returned, he shall and may within the time allowed by law, be called upon to bring in the body, by a rule for that

Rule that late sheriff shall bring in the body by a rule.

purpose, notwithstanding he may be out of office before such rule shall be granted. *R. T. 31 Geo. 3. (a)*

If bail not justified in due time, or rendered.

If the bail be not justified in due time, and the defendant be not rendered in their discharge, make affidavit of the service as before, and obtain an attachment, which is to be directed to the coroners of the county where the writ issued, or if in *London*, to the coroner.

Notes of Cases.

Where a rule to return a *fi. fa.* expires in vacation, to sheriff has till the first day of the next term to file it.

The sheriff was ruled on Saturday the 12th of May, 1804, two days before the end of Easter term, to return *fi. fa.*; no return was made, till the first day of Trin. term, on which day an attachment was obtained. Motion to set it aside. The court on inspection of the rule, were of opinion that it could only apply to writs returnable in term; because it says at the conclusion of it, "in default thereof the plaintiff shall be at liberty to move for an attachment the next day," which can only be moved for in term time. The master then put into the hands of the court a note taken, *Trin. 30 Geo. 3. by Master Benton*, as follows.—Where a rule to return a writ is served only three days before the end of a term, the sheriff has until the first day of the next term, and all that day to file the return. *Rule abs. 5 East. 386. Rex v. Sheriff of Berks.*

Sedente curia.

If rule expires last day of the term.

If the rule to return the writ expires on the last day of term, the sheriff is attachable at the rising of the court on that day, if no return be made before. *11 East. 591.*

Sheriff not liable to be called on to return process unless within six lunar months.

The defendant, who was sheriff of *Warwickshire*, went out of office 12th Feb. 1780, at four in the afternoon, and was not served with the rule to return the writ until the 30th of July following. Rule was made for an attachment for not returning the writ. The sheriff moved for a rule why a *supersedeas* should not issue for not obeying the first rule; *February* in this year consisted of 28 days, and therefore if the day on which the office expired was to be reckoned in, to make up the six months allowed by stat. 20 Geo. 2. c. 37. s. 2. the rule was served a day too late, and the defendant was entitled to the protection of the statute. *Lord Mansfield.* The old sheriff on the 12th

(a) Before this rule was made, the mode was by distringas against the sheriff.

of *February*, turned over by indenture to his successor, all unexecuted process. The act purports to be made for the ease of sheriffs with regard to the return of process. The act of quitting the office by turning over the writs, &c. to the new sheriff, was done by the defendant on the 12th *February*. This being a penal proceeding against the defendant, who is entitled to the most favourable construction of a statute expressly made for the ease of sheriffs, we think the day of his leaving the office is to be computed as a part of the six months, and therefore the rule to return the writ came too late. Rule for superseas made absolute. *The King v. Adderley, Doug. Rep. 463.*

Latitat sued 29th of Nov. 1796, returnable 23d Jan. 1797, on which defendant was arrested, and gave a bail-bond. On 24th same January the late sheriff was served with rule to return the writ, which he returned *cepi corpus* the 30th; after that, no proceedings were had until this term, being Mich. 1797, when the late sheriff was ruled to bring in the body, and an attachment was issued against him. *Motion to set it aside.* It appeared that both the bail were insolvent, and defendant absconded. Court thought it was highly unreasonable, that the sheriff should be called upon at this distance of time, when the bail and the defendant were become insolvent, and made rule abs. *Rex v. Sheriff of Surrey, 7 Term Rep. 458.*

Plaintiff having obtained a rule for an attachment against the sheriff, took no step thereon for a length of time until defendant became a bankrupt, the attachment was set aside for the laches. 9 *East. 467. Rex v. The Sheriff of Surrey.*

An arrest was made 21st Nov. 1796, and officer took an undertaking of an attorney for appearance. No bail having been put in, or bond taken, the plaintiff brought an action against the sheriff for an escape. On 7th Jan. 1797, defendant became a bankrupt, and on the 26th of same month, notice of bail was given, and a motion was made to justify, the sheriff offering to pay the costs of the action brought against him for the escape. The court held, they ought not to be permitted to justify. And were of opinion, that neither the sheriff or his officers ought to shew favour to any person arrested; they should on all occasions discharge their duty, and their forbearance in general is not an act of *humanity*, but of *avarice*. 7 *Term Rep. 109. Fuller v. Prest.*

Sheriff having returned *cepi corpus* in Hil. Term in 1797, on which plaintiff proceeded no farther till Mich. 1797, court held it unreasonable that he should be called on after insolvency of principal and bail to bring in the body, and attachment set aside.

If officer take an undertaking to put in bail, and not put in, and action for an escape, court will not permit the sheriff to justify bail on payment of costs of such action.

But if plaintiff consented. If the plaintiff or his attorney consented to accept the undertaking, that would have varied the case. *Ibid.* 110, 111.

Sheriff not liable to return writ, although requested before the six months without a rule. A sheriff is not liable to an attachment for not returning his writ, if he is not called upon by a rule of court so to do, *within six months after the expiration of his office*; notwithstanding he was requested by the party to return it *before the six months* were expired. *Rex v. Jones, late Sheriff of Carmarthenshire, 2 Term Rep. 1.*

If sheriff be in contempt before defendant's death, an attachment may issue. An attachment having been obtained against the sheriff of *Middlesex*, for not bringing in the body in a cause, *Robins v. Hall*; rule was made to set it aside, because defendant died before attachment issued, though not till after the contempt incurred. Court was of opinion, that as the sheriff was in contempt *before the defendant's death*, the attachment was regularly issued. And though the original cause abated by his death, yet that was no reason for setting the attachment aside, since he was in contempt *before*. *The King v. Sheriff of Middlesex, 3 Term Rep. 133.*

If exception to bail, notice be given of other bail, only one of whom justifies, and the names of the former still remain on the bail-piece, the former may surrender the principal. On a rule to set aside an attachment against the sheriff for not bringing in the body.—On the 1st of *May* bail was put in; the 14th, notice of exception given; the same day a rule to bring in the body was served. Notice was given on the 15th that two other bail would be put in and justify the 17th. Bail not having justified on the latter day, there was another notice to justify the 20th; on which day *one* justified, the *other* rejected, and further time was given to add another bail. On 21st notice was given that the other bail would justify the next morning; but, he not attending, the defendant gave another notice that the other bail would justify the 24th, and notice was also given that the defendant would surrender in discharge of his bail, which he did accordingly. On shewing cause it was contended, that the surrender was irregular, because the committitur was not entered until the 23d, nor the bail-piece filed until that time, when there was no bail in a condition to surrender the principal, one only having justified, the other rejected. *Per Curiam*: the master says that there should have been a rule to strike out the two first bail, whose names stood on the bail-piece; and that until that was done, they might surrender the principal, Rule abs. *Rex v. Sheriff of Essex, 5 Term Rep. 633. E. T. 34 Geo. 3. June 2d, 1794.*

An attachment having issued against the sheriff, and the debt and costs paid by him to the coroner, motion that further proceedings be stayed; *Cowper*, who shewed cause, contended that the plaintiff had *lost a term*,^(a) and therefore that the attachment ought to stand as a security, in case the plaintiff should recover a verdict. The court ordered the attachment to remain in the office *as a security* for the plaintiff's debt, and defendant to consent to trial at the sittings after term. T. 15 Geo. 3. *Gravett v. Williams*, 4 Term Rep. 352.

Court ordered attachment to stand as a security.

If the sheriff is fixed, and the defendant has merits, he may apply to be let in to the trial on an affidavit of merits, and perfecting bail; and, if granted, the attachment will be ordered to lie in the office in the mean time, and defendant must be upon terms of taking short notice of trial, &c. according to the following case.

If sheriff fixed, and defendant has merits.

Morgan moved to set aside attachment against the sheriff on payment of costs, bail having been put in, and *no trial lost*, on the ground that the court would grant this of course as no trial had been lost. *Lord Kenyon* said, that the master had furnished them with a note of *Gravett v. Williams*, and reported the practice to be, "that the attachment against the sheriff ought not to stand as a security, as no trial had been lost." And he desired that such might be considered to be the practice in future. Rule absolute. *Hill v. Bolt*, 4 Term Rep. 352.

Bail put in after sheriff fixed, attachment set aside, and no benefit from the attachment.

Rule to shew cause why attachment which had regularly issued against the sheriff, for not bringing in the body, should not be set aside, on payment of costs, bail having been put in, and *no trial lost*: it was contended there ought to have been an affidavit of merits. *Lord Kenyon*. Where the application is really made on behalf of the sheriff, it cannot be expected that he should make an affidavit of merits; though if it were an application on behalf of the defendant himself, we should certainly require it. But to prevent collusion in the present or any future case of this kind, we shall require an affidavit to be made on the part of the sheriff, that this application originated from him, and was not made in collusion with the defendant in the cause; if that be done, the plaintiff will have no reason to complain, and he will be put

If the sheriff apply to set aside a regular attachment, he must make an affidavit that the application originates from him, and that he is not in collusion with the defendant.

(a) Meaning that he could not try his cause in term so as to have had a judgment of the term.

in the same situation that he was originally entitled to be in:—The affidavit was produced on a subsequent day; but it appearing there, that the sheriff had discharged the defendant on his own undertaking, and neglected to take a bail-bond; the court refused to relieve the sheriff, who had been thus guilty of a breach of his duty, and discharged the rule. *Rex v. Sheriff of Surrey*, 7 Term Rep. 240. See S. P. 109: *Fuller v. Prest.* See also *Hill v. Bolt*, 4 Term Rep. 352. I should think that if the sheriff applies, the court will require in the affidavit “that he had taken “a bail-bond pursuant to the statute 23 H. 6. c. 9.”

Attachment refused for not taking replevin-bond.

An attachment was refused against a sheriff for neglecting to take a replevin-bond, because the party injured might maintain an action. *The King v. Lewis*, 2 Term Rep. 617.

The sheriff may render without the bail justifying; the rule T. 33 Geo. 3. extends to the case of sheriff.

The 18th of Nov. 1797, the writ was returnable, and the sheriff was ruled to return the writ: on the return, the defendant was in the Fleet; in an action in C. B. on 28th Nov. he was removed from the Fleet by *ha. cor.* and on the same day, he was surrendered in discharge of his bail in this action, and committed to the custody of the marshall, where he has been ever since; and on the next day, the 29th, the plaintiff was served with a notice of the surrender. On the 23d Nov. sheriff was ruled to bring in the body; on the 24th bail above was put in, though the time for putting in bail expired the 22d. Rule to bring in body expired 28th Nov. and on the 24th Jan. 1798, a rule for attachment was granted for not bringing in the body. Motion to set aside the attachment for irregularity. Court thought that the sheriff was not obliged to justify his bail, and that the rule, *Trin.* 33 Geo. 3. extends to the case of the sheriff, and made rule absolute. 7 Term Rep. 527. *Rex v. Sheriff of Middlesex.* The court denied the authority of *Hardwick v. Bluck*, reported in same book 297; the master had said he was mistaken upon the report of the practice, which was, that upon exception the bail must first justify.

If sheriff once in contempt, he is not purged by a surrender, on a subsequent day though an attachment be not moved for.

Defendant was arrested in *Trin. Term*, 1798. The plaintiff ruled the sheriff to return the writ in the same term, and on 26th June (the last day but one of the term) ruled him to bring in the body, so that defendant had till the first day of the term either to justify bail, or render. No bail were justified; and defendant did not surrender till the 8th Nov. Michaelmas Term; on the 9th, (being the following day) an attachment was moved for, and obtained against the sheriff for not bringing into court the body.

Court said, that the contempt was not purged, and discharged the rule for setting aside the attachment. *Rex v. Sheriff of Middlesex*, 8 Term Rep. 29. The C. P. contra. 1 H. Black. Rep. 9. *Thorold v. Fisher*.

The sheriff cannot relieve himself from an attachment, for not bringing in the body by payment of the debt sworn to and indorsed on the writ, since the statute 43 Geo. 3. c. 46. s. 2. he having neglected to take the deposit money at the time of the arrest, as directed by that act; but must pay the whole debt and costs. 9 East, 316. *Rex v. The Sheriff of London*.

When the sheriff cannot relieve himself.

Bail to the sheriff are liable to the extent of the penalty in the bail-bond, to satisfy the full debt and costs, although he cannot take the bond in a penalty of more than double the sum sworn to. *Dougl.* 330. in notes. So is the C. P. 1 H. Black. Rep. 233. Though if they enter into the recognizance, they are not liable beyond the sum sworn to. *Jackson v. Hassel*, *Doug.* 329.

Sheriff's bail liable to extent of penalty.

In the case of *The King v. the Sheriff of Middlesex*, 3 East, 604. the question was, whether the sheriff should be liable beyond the penalty of the bond? and upon full consideration the court were of opinion, that he shall not be liable beyond such penalty, with costs.

Sheriff not liable beyond the penalty of bond.

A return by the sheriff of *non est inventus*, procured by the plaintiff against the principal, in order to ground the proceedings against the bail, is irregular, if the principal be at that time in custody of the same sheriff on a criminal charge; and the court will set aside the proceedings against the bail with costs, where the plaintiff knew that the principal was in custody at the time of such return. *Ward v. Brumfit and Eastwood*, bail of *Rhodes*, 2 Maule and Selw. 238.

A return of non est inventus obtained by plaintiff against the principal to ground proceedings against bail is irregular.

COMMON BAIL.

APPEARANCE is the first act of the defendant in court, which is the act of the court itself, as is evident from the language of the bail-piece, 1 Salk. 8. and therefore the defendant may appear before the return of the writ. 1 Wils. 39.

Appearance first act.

A voluntary appearance is of no effect in this court, unless the plaintiff's attorney within fourteen days after such appearance, sue out a writ of latitat or bill of *Middlesex* where the defendant abides in that county. R. T. 4 IV. & M. reg. 1. But this rule cannot be taken advantage

Voluntary appearance.

of by any but the defendant, unless some particular fraud be alleged. 1 *Maule and Selw.* 408. n. a.

Special or common bail governed by the arrest.

Since the making the stat. 12 Geo. 1. c. 29. and the 19 Geo. 3. c. 70, *special* or *common bail*, are no longer discretionary in the court, but is governed by the *arrest*: it being a general rule, that wherever the defendant may be arrested, he may be holden to *special bail*: and wherever the defendant cannot be arrested, *common bail* is sufficient.

Within what time it is to be filed.

In this court where the defendant has been served with a copy of a bill of Middlesex, or other process thereon, he should file common bail at the return of it, or within eight days after such return, which are reckoned *exclusively*. *Sunday* is not accounted one of them. 1 *Burr.* 56.

Ejectment.

Common bail is to be filed for the casual ejector in ejectment, before judgment be signed against him. *R. M.* 33 *Car.* 2. *T.* 14 *Car.* 2.

Attorney.

An attorney subscribing process, be compelled to cause an appearance, or be liable to an attachment. *R. M.* 1654. *sect.* 10.

Common bail to be filed in eight days.

By stat. 5 Geo. 2. c. 27, where the defendant is served with a copy of the process, he must cause common bail to be filed on the return, or within eight days after such return. *Sect.* 1.

If the debt be under 4 s. defendant on appearance may move to stay the proceedings.

The defendant, although under short notice of trial, moved to stay the proceedings, the plaintiff's attorney acknowledging the debt was no more than 11. 11s. 6d. *Lord Kenyon.* This is a very general question which concerns the practice of the court, whether it shall be permitted to parties to sue in the superior courts for such small sums as those under 40s.: now that is expressly prohibited by act of parliament, 6 *Ed.* 1. c. 8. Therefore on consideration, we are of opinion, that the rule should be made absolute, but not with costs, as this is the first application of the kind. *Rule abs. Kennard v. Jones,* 4 *Term Rep.* 495.

Warrant to be filed.

By stat. 25 Geo. 3. c. 80. s. 22. a warrant or memorandum to defend, must be delivered to the clerk of the common bails, with the bail-piece now upon a 5s. stamp, the form of which is,

In the Court of King's Bench.

London, } J. F. is retained to defend by L. M. as his Warrant.
to wit. } attorney, at the suit of T. M.
Entered or filed of record the } J. T. Attorney (if by
day of in the 57th year } an agent add by) I. K.
of the reign of king Geo. 3. } his agent.

— Term, in the	year of the reign of
king Geo. III.	Law and Markham.
London, } C. D. having been served with	
to wit. } process, is delivered to bail to	
John Doe, of	yeoman,
	and
Richard Roe, of the same place,	
yeoman.	
J. T. Attorney, }	At the suit of
— 1817. }	A. B.

Common bail-
piece, 2s. 6d.
stamp on
parchment.

To be written on parchment, 2s. 6d. stamp; file it with How to pro-
Mr. Smith, the clerk of the common bails, at the King's ceed.
Bench office, with the warrant or memorandum as before;
who by rule, Easter, 30 Geo. 3. is to mark the bail-pieces
numerically as they are received, 6 T. R. 660. pay 1s. 2d. To be filed of
in term time, and 1s. 6d. in vacation. It is to be filed the term the
the term the writ is returnable. Rep. Temp. Hard. 128. writ is return-
Edgar v. Farmer. able.

Sunday is not to be accounted one of the days of ap- If Sunday in-
pearance, if it happens to be the last of the eight days; tervene.
as, for instance, if a writ be returnable on Saturday, the
defendant has the whole of the Monday to file his common
bail. Vide 1 Burr. 56. Shadwell v. Angel.

If an attorney undertake to appear, the court will com- Attorney un-
pel him so to do, even though he was imposed on when dertaking.
he made the undertaking, Lorimer v. Hollister, 1 Stra.
693. and should he refuse, an attachment will be awarded.
The undertaking must be an express undertaking to appear
in writing, and signed. Str. 445. Loft. 192. If he receive
a declaration, unless accepted on condition, he must enter
his appearance. 1 Lill. P. R. 102. If he takes on him-
self to appear, the court looks no further; whether he
has authority or not, the party is left to his action. 1 Salk.
87. Anon. R. M. 1654. s. 10.

It is ordered, that all clerks and attorneys for the plain- Common bail
tiff, upon signing of judgment by default, or non sum to be filed
informatus, shall pay to the secondary of this court 1s. 6d. upon judg-
ment by des

fault, or non
sum infor-
matus,

for the common bail, unless it was *before* filed, and the said 1s. 6d. shall be allowed the plaintiff in his costs. *R. Trin. 4 W. and M.*

Of filing Common Bail according to Statute.

When to be
filed by defen-
dant, or plain-
tiff may do it.

The stat. 5 Geo. 2. c. 27. enacts, "that in case the defendant does not file common bail within *eight days after the return of the writ*, the plaintiff may do it for him, on an affidavit being made of the service of process made before a judge or commissioner of the court for taking affidavits, or before the proper officer for entering common appearances, or his deputy, (and which affidavit shall be filed *gratis*) and may enter common appearance, or file common bail for the defendant, and proceed thereon as if such defendant had entered his appearance or filed common bail."

By rule, *M. 10 Geo. 2. Reg. 1.* for the better distinguishing by whom common bail shall have been filed, it is ordered that "in all cases where common bail shall have been filed by the plaintiff for the defendant, by virtue of the act, these words shall be written on the bail-piece, viz. *filed according to the statute*, or words to the like effect."

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

Affidavit of
service of pro-
cess.

* Latitat alias
capias, or plu-
ries capias.

E. F. clerk to G. H. of, &c. gentleman, attorney for the above named plaintiff, maketh oath and saith, that he did, on the day of instant, personally serve the above defendant with a true copy of a bill of Middlesex; which appeared to this deponent to be regularly issued out of this honorable court, and before the lord the king at Westminster, returnable on next after under which said copy was written an *English* notice to the said defendant, of the intent of such service, pursuant to the statute in that case made and provided.

E. F.

Sworn, &c.

To state name
of writ.

Care must be taken to state the *name of the writ*, for saying *served with mesne process only*, was held bad, after defendant was in execution, and judgment set aside, and defendant discharged. *Lakin v. Dervall, Trin. 25 Geo. 3.*

The plaintiff cannot appear before the *ninth day exclusive after the return of the process*, as if it be returnable the 13th of April cannot file it till the 21st. When plaintiff to appear.

This affidavit may be sworn before a *judge* of the court, or *commissioner* authorized to take affidavits in this court, or the clerk of the common bails, but not the attorney in the cause. Stat. 5 Geo. 2. c. 27. In town, it is mostly sworn *before the clerk of the common bails*, or his deputy lawfully authorized. Before whom sworn.

By 25 Geo. 3. c. 80. s. 22. Common bail may be filed by the plaintiff, according to the statute, without entering or filing of record *any memorandum or minute for the defendant*; but no solicitor shall plead or carry on any further proceeding for such defendant (if common bail has been filed according to the statute), without filing the minute or memorandum before mentioned, under penalty of 5*l.* Sect. 23. If a defendant is added after commencement of an action, such a memorandum is not necessary. Sect. 24. May be filed by plaintiff without the stamp.

Common bail must be filed by the plaintiff according to the statute, before he can declare in *chief*. *Smith v. Painter*, 2 Term Rep. 719. C. B. must be filed before declaring in chief.

It is the uniform practice to sign judgment the 2d of November, before the *essoign day*, in all cases where common bail is filed between the 2d and 6th of November; therefore where common bail was filed the 3d of November, and it appeared by the book that judgment was signed on the 2d, yet in fact it was not signed till *after* the common bail filed, the court held the judgment regular. *Wansey v. More*, 5 Term Rep. 65. The practice to sign judgment on 2d of Nov. before the *essoign day* where bail is filed between the 2d and 6th Nov.

Common bail cannot be filed for an infant under the stat. though sued jointly with other defendants. *Bligh v. Minster and others*, T. 28 Geo. 3. K. B. Infant.

If the defendant be sued by a *wrong name*, and do not appear, plaintiff cannot rectify the mistake by appearing by his *right* according to the stat. 3 Term Rep. 611. nor can he appear for him in the name by which he is sued, and afterwards declare against him in his *right name*. 10 East. 328. 11 East. 225. 3 Maule and Selw. 450. If defendant be sued by a wrong name plaintiff cannot rectify it by appearing by right.

In what Cases Common Bail will be ordered.

When a married woman imposes on a trader, and contracts on her own credit; court will not relieve a sum- Married woman.

mary way; but where it has appeared, that plaintiff knew her to be a married woman, court has discharged her. *Waters v. Smith*, 6 Term Rep. 451.

- If the affidavit of the plaintiff be defective, *i. e.* swearing that the debt is due (as appears by the bonds) as appears by the testator's books^b; to the *penalty*, instead of the *principal and interest* due on bond^c; or joining in one stamp, debt and *assumpsit*^d; taking out a writ where common bail has been ordered upon a former one, before the costs taxed and paid, upon a rule to discontinue^e; holding to bail one who was formerly arrested and superseded, though he gave a note for 20l. f; for costs on a non-suit upon a recovery in a foreign court; for malicious prosecution, where the affidavit only said "due upon a judgment or decrees;" upon a promise to pay after a commission issued, and certificate signed^h; upon a promise to pay two guineas *per* month after taking the benefit of an insolvent debtor's act, though part actually paidⁱ; on an old affidavit of a debt due sworn some time back^k; on a judgment after defendant had been superseded^l; or on a second judgment (and where the maker and indorser of a promissory note are joined in one affidavit, neither can be held to bail);—where the defendant is held to bail on the judgment (*where bail has been given in the original action*,) or that defendant is indebted to him in 200l. on promises, *Dougl. Rep.* 468. *Cope and another v. Cook*; or where the assignee or executor does not swear that *they believe the debt is due*; 1 Term Rep. 716: the court can order common bail, although defendant hath put in special bail, if the case require it^m: also if there be not *separate* affidavits filed where there are *more* defendants than one, and the cause of action be *not joint*. *Dougl. Rep.* 218. *Gilby v. Lockyer*. If the affidavit be intituled in a cause, common bail will be ordered. So in *trover* for a bill of exchange, not stating, that the bill remains unpaid, 7 Term Rep. 748. So if an affidavit of debt be made abroad, and has not the requisites of such, made here. *Ibid.* 376. *Vide title Affidavit*. Stating that defendant was indebted in 50l. upon and by virtue of a certain agreement, &c. whereby each of them bound himself unto the other in 50l. for performance, and which defendant hath neglected and refused to perform, on his part. This is not a case of stipulated damages, it is not stated what the agreement was, nor in what respect it was broken. *Wildy v. Thornton*, 2 East. 409. For stipulated damages the defendant may be holden to bail;
- ^a Str. 1157.
^b Ib. 1219.
^c Ib. 1209.
 1226.
^d 5 Burr. 2660.
^e 1 Str. 1299.
 Ib. 1218.
^f Ib. 1243.
^h 3 Burr. 736.
ⁱ Str. 1223.
^k Ib. 1270.
^l Ib. 1039.
 6 Term Rep. 254.
^m Str. 1077.

but not for a penalty. *Ibid.* See 6 *Term Rep.* 13. *Salk.* 100. *Say.* 109, 217. *Barn.* 109.

If the *ac-etiam* be in case, and plaintiff declares in debt, the court will discharge defendant on common bail. *Trin.* 1809.

The plaintiffs sued an original writ against the three defendants, in which was a set of counts against them, as surviving partners of *Gregory*, and another set against them in their own right only. Two of the defendants were outlawed, and the defendant *Mure* was held to bail in 20,000l. for money had and received by the four partners, *Gregory* being dead. The declaration contained counts against defendants in their own right, without stating they were the surviving partners of *Gregory*. Rule to set aside proceedings for irregularity, and why an *exoneretur* should not be entered. *Per Cur.* The plaintiffs have abandoned their right to bail by the variation between the affidavit to hold to bail, and the declaration. Rule absolute on defendants filing common bail. *Cur.* We cannot set aside all the proceedings for irregularity. If the defendants think that the variance between the original writ and declaration is fatal, they may take advantage of that, on a writ of error. The latter part of the rule to set aside the proceedings was discharged. *Spalding v. Mure*, 6 *Term Rep.* 363.

Defendant held to bail on an affidavit of debt due from three defendants as surviving partners of another deceased, was discharged on filing common bail, declaration being for a debt due from the three defendants alone.

If baron and feme are sued, the baron must appear for himself and wife. The wife's appearance is not void, though the plaintiff cannot proceed without bringing the husband into court. 1 *Wils.* 264.

Baron and feme.

Where the defendant has been sued and held to bail by a wrong christian name, but the plaintiff has declared against him, and bail has been put in and perfected for him by his right name, the bail cannot afterwards object to the irregularity upon a motion to enter an *exoneretur* upon the bail-piece. 13 *East.* 273. *Clarke v. Baker.*

If a writ be served on the defendant by a wrong name, he may be declared against by his right name after his appearance; but you cannot appear for the defendant according to the statute, contrary to the name in the writ. 3 *Term Rep.* 611. *Doo v. Butcher.* 11 *East.* 225. *Dring v. Dickenson.* In common process, I do not conceive it necessary that the declaration need state that he was served by the wrong name. If there be an arrest and bail put in, it is necessary, because the bail-piece always states

If a writ be served on the defendant by wrong name, he may declare against him by right name.

the real name of the defendant, with the addition of "having been arrested by the name of John."

If the defendant be sued by the name of J. it is irregular for the plaintiff to declare against him by the name of R. sued by the name of J. and the defendant may set aside the proceedings before plea. 10 *East*. 328. *Delanoy v. Cannon*.

Common bail must be filed for defendant where you enter up judgment on a warrant of attorney, on pain of 10s. to the box. *Hil. 1 W. & M.* And a memorandum or warrant is to be filed on a 5s. stamp with the clerk of the common bails, previous to entering the judgment. *Sect. 19. Vide Judgment on Warrant of Attorney.*

Defendant insane. The court will not discharge defendant out of custody on filing common bail, on the ground that he was *insane at the time of the arrest*. *Nutt v. Verney et al. 4 Term Rep.* 121.: but will, if defendant becomes a peer, exonerate the bail, *Trinder v. Shirley, Dougl.* 45. or member of parliament, pending the suit. *Langridge one, &c. v. Flood, H. 26 Geo. 3.* Or order common bail, if special bail be not filed.

A peer or member,

SECURITY FOR COSTS.

Formerly refused. It seems that a motion has often been made for securing to the defendant the costs, in case he succeeds in his action. This the court refused in the late reign, unless in actions *qui tam*, &c. giving as a reason that it would affect trade, and be excluding foreigners from obtaining justice in our courts. *Lamie v. Sewell, 1 Wils.* 266. *Str.* 126. 2 *Str.* 1206. 4 *Burr.* 2605. *Boswell v. Irish, Cowp. Rep.* 158.

Application for security must be made first to plaintiff prior to motion. The court will not grant a rule, that the plaintiff may give security for costs, unless application has been made to him to give security. *Bass v. Clive, 3 Maule and Selw.* 283.

In ejectment.

The cases in ejectment are considered as more under the power of the court than other proceedings, and therefore the court has stayed a second, till the costs were paid of the first. *Real & al. v. Macay, Str.* 1206.

Lessor of plaintiff an infant. Lessor of plaintiff an infant, or abroad, shall name a good plaintiff, or give security for costs. 1 *Wils.* 130. *Anonymous.*

A similar undertaking is also required in an action for Mesne profits, brought in the name of the nominal plaintiff, in ejectment.

If a second action appear, and all the circumstances of the case, to be vexatious, the court will order the proceedings to be stayed, until the costs of the former one are paid. *Melchar v. Halsey*, *Say. Law of Costs*, 247. *Gravenar v. Cape*, *ibid.* there cited by *De Grey, C. J.*

If a second action appear vexatious.

In an action by husband and wife, the court stayed the proceedings until the payment of costs in a former action at the suit of the husband only, it being for the same demand. *Lampley et ux. v. Sands*, *H. 25 Geo. 3. K. B.*

Action by husband and wife.

Lessor of plaintiff residing in Ireland, shall give security for costs, though ejectment is brought by the direction of Chancery, where security is already given. *Denn v. Fulford*, 2 Burr. 1177.

Lessor residing in Ireland.

It seems now, that this rule will be granted in all actions brought by foreigners; and for this reason, that if a verdict be given against the plaintiff, he is not within the reach of our law, so as to have process served upon him for the costs. *Pray and others v. Edie*, 1 Term Rep. 267.

Now granted.

If an Englishman sue in a foreign court, he must give security for costs; and therefore a like rule was made against the plaintiff, who resided at Waterford in Ireland. *Fitzgerald v. Whitmore*, 1 Term Rep. 362. But this motion was refused, after notice of trial given, as defendant might have applied earlier, after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walker v. Trythall*, 5 East. 338. See 6 Term Rep. 597. contra. The court said, this was the better rule.

If an Englishman sue in foreign court. Refused after notice of trial given.

A mere temporary absence of the plaintiff, by his going abroad, is no ground for requiring security for costs. *R. E. 40 Geo. 3. Anon.*

Temporary absence.

The court have decided that bail be put in previous to the motion, for the defendant not being in court, he is not in a situation to make the application. *De la Preve v. Duc de Biron*, 4 Term Rep. 697. *E. 32 Geo. 3.*

Bail before motion.

The proceeding will not be stayed in a *qui tam* action, merely on account of the plaintiff's poverty. *Corp. Rep. 24.*

Qui tam action.

In the case of *Doe ex dem. of Selby v. Ashton*, baronet, Mr. Justice Buller said, there are only three instances

Infant.

in which the court will interfere on behalf of the defendant, to oblige the plaintiff to give security for costs; the first is, when an infant sues, the court will oblige the prochein amy, or guardian, or attorney, to give security for the costs.—Secondly, Where the plaintiff resides abroad; in which case the court will stay the proceedings till security is given for the costs; and,—Thirdly, Where there has been a former ejectment; but there the rule is to stay the proceedings in the *second* ejectment, till the costs of the former are paid, and not till security is given for the costs of the second. 1 *Term Rep.* 491.

Residence
abroad.

Former eject-
ment.

Proceedings
staid in former
ejectment
brought by
the father.

The reason.

Proceedings in ejectment were staid till the costs of a former ejectment brought by the father of the lessor of plaintiff in 1772, against the defendant's father on the *same title* were paid. *Doe dem. Feldon v. Roe*, 8 *T. R.* 645. In the case of *Fairclaim v. Thrustout*, *E.* 24 *Geo.* 3. cited, Lord Mansfield said, that the court had arrived by degrees to this practice. It was adopted to *prevent the hardship of frequent ejectments on the same title*, and was the more reasonable; as in *real actions*, all representatives of the party were concluded for ever, from setting up *the same title*.

Ejectment and
action for
mesne profits.

Proceedings in ejectment were staid, until the costs of a former ejectment, and also of an action for the *mesne profits* were paid. *Doe ex dem. Finchard v. Roe*, 4 *East.* 585.

When bank-
rupt to give
security, and
when not.

An uncertificated bankrupt, bringing an action for the benefit of his assignees, was required to give security for costs, in case he should fail in the suit. 7 *Term Rep.* 296. *Webb v. Ward*. But it is otherwise where the action is brought for his own benefit, as for the produce of his earnings since his bankruptcy. 1 *East.* 431.

Lessor of full
age.

If lessor is *known*, of *full age*, and *resident* in the *country*, court will not order him to give security.

If one of two
defendants put
in bail, and
plaintiff a fo-
reigner.

If a *foreigner* sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give security for costs, without putting in bail for the other. *Carr v. Shaw and another*, 6 *Term Rep.* 496.

To be made by
motion or
summons.

This mode of application may be made by motion or summons, and it is referred to the master to take the security.

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

Notice of motion to stay proceedings till security be given for costs.

Take notice, that this honourable court will be moved to-morrow (or on next,) or so soon after as counsel can be heard, for a rule to shew cause why all the proceedings in this cause shall not be stayed until security be given for the payment of costs. Dated the day of 1817.

Yours, &c.

G. H. defendant's attorney.

Of calling for Plaintiff's Residence.

In ejectment and actions *qui tam**, where the plaintiff, or his lessor, is unknown to defendant, the latter may call for an account of his residence, or place of abode, from the opposite attorney by *motion* or *summons*, and if he refuse to give it, or give in a *fictitious* account of a person who cannot be found, the court will stay the proceedings until security be given for the costs.

* Str. 681, 697, 705.

OF THE DECLARATION.

THE declaration is a legal specification of the circumstances which constitute the cause of action, and in actions by original, is the exposition of the writ, with the addition of time, place and other circumstances, *Co. Litt.* 303. But if the proceeding be by *bill*, then the declaration is a *mere copy of it*, and in either case, it should correspond with the *process*, in the *names* and *descriptions of the parties*.

Definition of

The *use*, *nature*, and *design* of pleading is only to render the fact *plain* and *intelligible*, and to bring the matter to judgment with a convenient certainty; and in the time of *Ed. 1.* the pleadings were short, plain, and simple, ever having respect to *matter* and not to *form of words*. 1 *Inst.* 304. *H. H. C. L.* 172.

Its use and design.

With respect to the unnecessary length of declarations by rule, *M.* 1654. *Sec.* 12. That upon actions on the stat. of *hue and cry*, *monopolies*, or for a suit in the *Admiralty*, and such like, other than debt, the *declaration* is *not* to repeat the *original writ*, so in *personal actions*, but only the *nature of the action*; in *covenant* not to repeat more of the deed, than necessary for the assignment of the breach. In *slander*, long preambles be forborne, and no more inducement than necessary to maintain the action, unless a special inducement is required, or *colloquium*. In debt upon 2 *Ed.* 6. for *Tithes*, and 32 *H.* 8. c. 21.

Unnecessary length of declarations.

Covenant.

Slander.

Debt for
tithes, &c.
Judgments.

Jac. 11. For maintenance, or on general statutes, on the declaration not to repeat the statute, but to conclude *contra formam statuti*. In debt upon judgments had at *Westminster*, to recite only the judgment: but if had by or against an executor or administrator then debt upon that judgment, to repeat the declaration, and judgment. *Sect. 13.*

Of striking out unnecessary Counts.

In case there
be several
counts.

If it appear on the face of the declaration, or by reference to the bill of particulars, that some of the counts are superfluous, the court will order them to be expunged; and if there be any vexation, will make the plaintiff pay the costs of the application. (a)

If there are several counts in a declaration, and precisely the same, or only a formal difference between them, and the same evidence will support each, as if the plaintiff declare specially and generally, for a matter that may be given in evidence upon a general count, the court will expunge the general counts. *Cas. temp. Hard. 129.* So if by reference to the bill of particulars (which defendant may now have,) they will expunge such counts as are unnecessary.

Reference in
first instance.

The usual mode is to refer it to the master in the first instance, and the court will on motion for his report, decide. And Lord *Hardwicke*, in *Wilkins v. Perry*, said, (on a motion to refer the declaration,) as you have obtained time to plead without applying to the court to have the counts struck out or referred to the master, which is the usual way, the rule must be discharged. *Rep. temp. Hard. 129.*

What a declaration in covenant need not state.

In an action against the sheriff, for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise; but if it does, and they are not all proved as stated, there the plaintiff shall be nonsuit. *Bristow v. Wright, Dougl. 664.*

If it contain
indecent language.

Where the declaration unnecessarily contains indecent language, the court, it seems, will order it to be referred for scandal and impertinent language, and direct the

(a) The motion should be made before time obtained, *Rep. temp. Hard. 129.* A summons in vacation will do.

direct the master to tax exemplary costs. 2 Wils.
20.

Where the declaration consisted of 286 counts upon as many banker's notes for a guinea each payable to bearer, with common counts for money lent, &c. this court refused to strike out the counts upon the notes, as it might put the plaintiff to unnecessary difficulty in proof at the trial, or make it necessary for him to have a writ of inquiry on a judgment by default. *Lane v. Smith*, M. 46 Geo. 3. K. B. 3 *Smith's Rep.* 113. S. C. But court will not strike out counts, if by so doing case is rendered difficult of proof. Impertinent.

Variance between Process and Declaration.

The process was "to answer the plaintiff *qui tam pro domino rege, quam pro seipso sequitur*:" the declaration was in his own name only: omitting the *qui tam* part. Court held the variance to be fatal, and ordered the proceedings to be set aside. *Manning v. Davis*, 4 Burr. 2417. But Mr. Justice Yates said, though the plaintiff may style himself executor, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt, for the demand is still the same: But in this case, the very nature of the demand is altered; the process, importing a demand to the king and plaintiff, and the declaration, a demand to the plaintiff only. 2 Black. Rep. 722. *Lloyd v. Williams*. Variance between process and declaration.

In a subsequent case the proceedings were set aside where the process was to answer the plaintiffs as assignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out in a special character. *Meggs, assignee, v. Ford*, E. 25 Geo. 3. To answer as assignees, and declaration in their own right.

Court said, it was not usual to insert in the bill of *Midgless*, on what account, or in what light the party sues, as in the case of executors and administrators, the case of an assignee of a bail-bond, and the like, when the process is only *ad respondendum* to A. B. 2 Str. 1232. *The Weavers Co. qui tam v. Forest*. May declare *qui tam*, though process is not so.

The *ac-etiam* in the latitat was for a certain sum in debt, and the declaration for only half that sum. Motion to discharge defendant on common bail. *Per Curiam*. The same strictness, which prevails with regard to original writs, does not obtain respecting others. In order to prevent any incongruity on the record, it has been held, that the declaration must pursue the original writ; but this The court will not on motion, permit a defendant to take advantage of a variance between the sum men-

tioned in the
ac-etiam
part of the la-
titat, and the
declaration.

objection will not appear on the face of these proceedings, this action having been commenced by bill. Where indeed the plaintiff has varied the nature of this action, as where he has sued out a writ of *quare clausum fregit*, and declared in trover, or where the objection has been to the plaintiff's right of suing, as where he has taken out a writ in his own name, and declared as executor, such objections have been allowed on motion. But there is no instance, where the court has interfered, on motion for such an objection as the present, which merely goes to the sum sued for. *Turing v. Jones*, 5 Term Rep. 402. Rule refused.

If sued on
joint process.

In general where the cause of action is bailable, the plaintiff cannot declare against one defendant separately upon joint process, and affidavit to hold to bail against two, though they were sued on joint and several promissory notes, 4 East. 589. ; or though the other defendants are out of the jurisdiction of the court. *Thompson and another, executors, &c. v. Cotter, Kellet, and two others*, 1 Maule and Selw. 55. And where the defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the court will set aside the direction, and subsequent proceedings for irregularity. 4 East. 489. 5 T. R. 722.

As to Particular of Demand.

Plaintiff to
give defendant
particular of
his demand.

Lord *Manfield* thought it reasonable that in all cases (as well where attornies were plaintiffs, as where other persons were plaintiffs) the plaintiff ought to give the defendant an account of the particulars of his demand. *Le Breton v. Braham*, 3 Burr. 1390.

The nature
of the parti-
cular, and how
far defendant
is bound by it.

The particular is to apprise the party of what he is to come prepared to try; and the plaintiff who gives it must be bound by it, (a) or particulars are of no use. Therefore in an action on a promissory note, the particular given in under a judge's order was, "That the action" "was brought to recover the amount of a promissory

(a) Although the plaintiff after delivering a particular of his demand cannot at the trial himself give evidence out of it, yet if the defendant's evidence shew that there were other items which he might have included in his demand, he is entitled to recover all that appears to be due to him. 1 Camp. N. P. Rep. 68.

"note for 100l. given by G. W. in her life-time, and payable with interest." The note was produced, and it was on an improper stamp: plaintiff gave evidence of a loan of money to the amount of the note, being the consideration. Lord *Kenyon* said, I would assist the plaintiff if I could, but the defendant having come prepared to meet one demand, must not be called to meet another, and nonsuited the plaintiff. *Wade v. Beasley*, 4 *Esp. N. P.* 7.

If the plaintiff deliver a particular, under an order, for goods sold, and for so much money due and owing on an account settled and balanced for horses, the property of plaintiff, sold and delivered, he cannot go into evidence of a demand for goods of the plaintiff sent to him to be sold as his agent, and for which he has received the value as money had and received. Lord *Eldon*. The use of the particular is to apprise the defendant for what demand the plaintiff meant to go, that he might direct his proof accordingly, and not be taken by surprise at the trial; and that the plaintiff should not mislead the defendant, by giving in one thing as his demand under a judge's order, and starting another at the trial. *Holland v. Hopkins*, 3 *Esp. N. P.* 167.

The defendant may call for a particular of the breaches in an action on a bond for the non-performance of covenants, and so in actions on statutes, where a general form of declaring is given. And it seems to me, to be discretionary in the judge, in any action to grant the order.

Actions for breach on bond for non-performance of covenants, and on statutes.

In ejectment on the forfeiture of a lease, the judge will grant the order to deliver the breaches of covenant, on which he intends to rely. 6 *Term Rep.* 597. *Doe v. Birch*.

Ejectment on a forfeiture of lease.

So if the plaintiff declare generally in ejectment, and the defendant have any doubt what lands the plaintiff means to proceed for, he may call for a particular, and Mr. Justice *Grose* also made an order on the defendant, to specify the particulars for which he defended. *Doe ex dem. Saunders v. Duke of Newcastle*, 7 *Term Rep.* 332. in n.

So in ejectment on a general declaration.

So defendant may be called on.

The defendant being allowed to have a particular of the plaintiff's demand, the plaintiff, if he pleads or give notice of set-off, has a right to a particular of set-off. But if the particulars of the set-off be not delivered within the time mentioned in the judge's order, the defendant be precluded from giving evidence in support of his set-off.

On notice of set-off, plaintiff is entitled to a particular.

How to proceed.

As soon as the writ is served, the defendant's attorney may obtain a summons before a judge for the plaintiff's attorney or agent, to shew cause why he should not deliver the particulars in writing, of the plaintiff's demand, for which the action is brought, and that in the mean time all proceedings should be staid. I take it that this summons may be obtained even so late as after issue delivered. The judge will make an order agreeably to the summons, which operates as a stay of the proceedings, till the particulars are delivered. This order must be drawn up, and a copy served on the plaintiff's attorney or his clerk, or left at his usual place of residence: it will be necessary to keep this order, and be ready to prove that a true copy was served at the trial.—The like proceeding will be on the part of the plaintiff, in case he wishes to have a particular of defendant's set-off.

Order to be drawn up and served.

If the particular be not explicit.

Or incorrect, may amend.

In case the particular delivered be not sufficiently *explicit*, the party to whom it is delivered, may have a summons for further particulars, and the judge will make an order. Or if the particular be incorrect, or not sufficiently comprehensive, the party delivering may have a summons to *amend* same, and the judge will make an order.

How long time defendant has to plead after delivery of particulars of demand.

If premises in particular are described in a wrong parish.

The defendant has the same time to plead after a delivery of a bill of particulars as he had when the summons for it was returnable. 13 *East* 508. *Mowbray v. Schuberth*.

Where the plaintiff declared in debt for rent, without shewing in what parish the lands were situate, and delivered a particular of his demand, describing them in a wrong parish, the court held that the plaintiff might recover, it not appearing that any misrepresentation was intended, or that the defendant held more than one parcel of land of the plaintiff, so as to be misled by it. *Davies v. Edwards*, 3 *Maule and Selw.* 380.

Of Declaring.

Two ways to proceed.

There are two ways in which the plaintiff may declare; the one on the return day of the writ, which is called *de bene esse*, conditionally, until special or common bail be filed, or after the day for filing common bail, or the de-

endant has *justified his bail*, which is called *in chief*. If to speed the cause, the former is the best way of proceeding. And a rule to plead may be given on the same day.

If the cause be by original, a declaration cannot be delivered *de bene esse* till the *first day in full term*. *Burgh v. Dixon*, *M. 14 Geo. 2. Cromp.* 97.

The writ was returnable the 15th of *November*, being the 2d return, and a declaration *de bene esse* was filed the 24th, to plead in eight days; held well delivered (though not till the 9th day,) because two *Sundays* intervened. *1 Burr.* 56. *Shadwell v. Angel.*

If two Sundays intervene.

When a declaration is filed *de bene esse*, till common bail, or appearance entered, or till special bail be filed, notice that it is *so filed*, must be given to the defendant in writing. *Vide Proceedings by Original.*

Notice.

Where the plaintiff holds two defendants to bail on a *joint action*, and declares against them severally, the court will set aside the proceedings for irregularity. *Moss and another v. Birch and another*, *5 Term Rep.* 722. *Vide Holland v. Johnson*, *4 Term Rep.* 695, and *Holland v. Richards*, 697.

If two defendants held to bail in one action, plaintiff cannot declare separate.

How Declaration to be ingrossed, &c.

The declaration being drawn, is to be ingrossed on 4d. stamp paper, and if the defendant has appeared, or put in bail, delivered to the attorney by whom such appearance or bail is entered: the usual charge for the copy is indorsed on the back of the declaration, being 4d. *per sheet*, (72 words making a sheet) besides the duty, but nothing for paper; you also charge the warrant to defendant 4d.

The declaration must be written upon *one side of each sheet only*, and if delivered written on both sides to a prisoner, he will be entitled to be discharged out of custody. *Champneys v. Hamlin*, *12 East.* 294.

If defendant be a prisoner.

If the defendant has not appeared, or the abode of the attorney appearing cannot be found, you file it with the clerk of the declarations, and give the defendant notice thereof.

If the defendant has not appeared, or abode of attorney not known.

It is ordered that upon the appearance of any attorney or other person, for any defendant in this court, the plaintiff's attorney shall not be bound to deliver to the defendant's attorney the original declaration; but instead thereof, shall deliver a true copy of such declaration, and that

Defendant's attorney to pay for copy of declaration

4d. per sheet,
computing 72
words to a
sheet, and
duty.

upon the delivery or tender thereof, the defendant's attorney, or other person acting for him, shall pay unto the plaintiff's attorney, or other person acting for him, for the copy of such declaration after the rate of 4d. per sheet copy-ways, together with the stamps or king's duty thereon, which shall serve and be in lieu of the copy of such declaration usually made by the defendant's attorney. (a)

On refusal de-
claration may
be filed.

And if any attorney, or other person, shall refuse to pay for the copy of any declaration so as aforesaid tendered, the plaintiff's attorney shall and may leave the said copy of such declaration in the office, with the clerk that keeps the files of declarations of this court, who shall receive the same without fee or reward. *R. Trin. 12 W. 3.* But in this case, notice must be given of such declaration being filed to defendant, or his attorney.

But notice
must be given.

The declaration must not be delivered later than 10 at night. *R. M. 41 Geo. 3.*

Of declaring where Special or Common Bail is filed.

How declara-
tion to be de-
livered if com-
mon or spe-
cial bail be
filed.

It is ordered, that in every cause in which special or common bail be filed, and notice thereof given to the attorney for the plaintiff, a copy of the declaration shall be delivered to the defendant's attorney, who shall pay for the same according to the usual rate; but if the attorney for the defendant, or his clerk in his absence, refuses to pay for such copy, or if it shall happen that the abode of the defendant's attorney be unknown to the plaintiff's attorney, then it shall be lawful to leave such copy with the officer of this court appointed for affiling declarations; and notice thereof shall, without delay, be given to such defendant or his attorney; and such declaration shall be held well delivered from the time of such notice only. *R. Trin. 2 Geo. 2.*

Of declaring when Plaintiff files Bail according, &c.

The plaintiff cannot declare in chief, unless common bail be filed by defendant, or he has done it for him.

(a) None of the pleadings are now paid for, unless taken out of the office where filed, as judgment cannot be signed for want of it. See title *Issue*.

Smith v. Painter, 2 Term Rep. 719. 1 Term Rep. 635.
Cooke v. Raven. And it ought to be filed the term the writ is returnable. *Rep. temp. Hard.* 138.

In all causes where a copy of the process of this court is served upon any defendant or defendants, and an appearance is entered, or common bail filed for such defendant or defendants, by the plaintiff's attorney, pursuant to the act, the plaintiff's attorney, in such case, shall leave a copy of the declaration in the office with the proper officer appointed for that purpose, and likewise give notice thereof to the defendant or defendants, by delivering an *English* notice, written in secretary hand, to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; in which notice shall be likewise expressed the nature of the action, and at whose suit prosecuted, and the time limited by the rules of this court, for such defendant or defendants to plead to such action; and that in case such defendant or defendants do not plead to such declaration by such limited time, so to be expressed in such notice, judgment will be entered against such defendant or defendants by default. And from the time of giving such notice as aforesaid, such declarations shall be deemed well delivered to such defendant or defendants, and not otherwise. And in case such defendant or defendants (after such notice given,) do not plead by the time the rules for pleading are out, the plaintiff in such case may sign his judgment, without any other or further calling for a plea; and thereon give notice of executing his writ of inquiry, either by delivering a notice in writing to such defendant, or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be a sufficient notice to such defendant or defendants, of the time of executing such writ of inquiry. *R. T. 1 Geo. 2.*

How to deliver declaration if plaintiff appears for defendant according to the statute.

Well delivered from the time of notice.

If no plea, judgment may be signed, and notice of executing inquiry given.

The declaration was filed on the last day of the second term, after the return of the writ: but the notice to plead was only given a little before the *essoign-day* of the following term; it was holden to be well enough. *West v. Radford*, 3 Burr. 1452. 2 Term Rep. 112.

Filed last day of the second term, good, though no notice.

Of Declaring de bene esse on Common Process.

It is ordered, that upon all process to be issued out of this court, returnable before the last return of any term, Of delivering declaration de bene esse

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where no affidavit filed, upon process returnable before the last return.

To what this rule extends.

where no affidavit shall be made and filed of the cause of action, pursuant to the act of parliament for preventing vexatious arrests, the plaintiff may file, or deliver the declaration *de bene esse*, at the return of such process, with notice to plead in eight days after the filing or delivery thereof; (a) and if the defendant doth not file common bail, and plead within the said *eight days*, the plaintiff having filed common bail for such defendant according to the said act, may sign judgment for want of a plea, provided that such declaration be delivered or filed, and notice thereof given four days exclusive, before the end of such term, and a rule to plead be duly entered. *Rule, Trinity Term, 22 Geo. 3.* This rule extends such delivery to all returns, but the *last return*: if the writ be returnable on the *last return*, a declaration *de bene esse* cannot be delivered at all; for the defendant must be in court, either by his own appearance, or that of the plaintiff's for him, before the plaintiff can declare at all. Therefore no declaration can be delivered but in chief, in this case. *Contra in C. P. 1 H. Black. 533. Abbey v. Martin.*

Plaintiff may deliver declaration conditionally before time for appearance expired.

The plaintiff may deliver a declaration conditionally before the time for appearance is past, and afterwards file common bail for the defendant; but if the time be elapsed for appearance, he then must first enter an appearance for the defendant according to the statute, before he can declare. *2 Term Rep. 719. 6 Term Rep. 548. Baker v. Cooper.*

The like on Bailable Process.

Of delivering declaration *de bene esse* where an affidavit is filed.

Upon process to be issued and made returnable as aforesaid, where an affidavit shall be made and filed of the cause of action, pursuant to the said act, the declaration may be filed or delivered *de bene esse* at the return of such process, with notice to plead in four days after such filing or delivery, if the action be laid in *London* or *Middlesex*, and the defendant lives *within 20 miles* of *London*; and in eight days if the action is laid in any other county, or the defendant lives *above 20 miles* from *Lon-*

(a) These days are exclusive; if notice be delivered the 11th, judgment cannot be signed till the 20th. *Per Cur. M. 46 Geo. 3.*

don. And if the defendant puts in bail, and doth not plead within such times as are respectively before mentioned, judgment may be signed: provided that such declaration be delivered or filed, and notice thereof given, four days exclusive before the end of such term, and a rule to plead be duly entered. *Rule, Trinity Term, 22 Geo. 3.*

Writ returnable last day of *Trinity* term, on which lay bail was put in, but did not justify till 9th *November following*, and no declaration being delivered *de bene esse* before the *essoign-day* of *Michaelmas* term, notion for time to plead till the next term: Court said, that no laches can be imputed to the plaintiff for not declaring *until the defendant is perfectly in court*, and refused the rule. *Rolleston v. Scott, 5 Term Rep. 372.*

Generally if the process be returnable the *last* return-day of the term, and the plaintiff deliver his declaration *before the essoign-day* of the *next* term, in such case, the notice must be for defendant to plead within the *first four days of the next term*, he being in that case, entitled to an *imparlance*.

The 6th of *November* 1798, the writ was returnable, and a notice of a declaration served same day, of its being filed generally instead of *de bene esse*; it turned out, that the declaration in the office was in fact indorsed, "*filed conditionally.*" The court held, the proceeding was regular, and ordered the rule to set aside the judgment and subsequent proceedings to be discharged. *Cort v. Jacques, 8 Term Rep. 77.*

Of declaring by the bye.

A declaration *by the bye* pre-supposes a declaration in *chief*; therefore the plaintiff must declare in the *original action*, before he can declare by the bye. *Delves qui tam v. Strange, 6 Term Rep. 158. 7 T. R. 80.*

A general rule for settling and declaring the practice of this court touching declaring by the bye in cases where the plaintiff, in any action or suit, hath filed or shall file common bail for the defendant, pursuant to the late act of parliament, for preventing frivolous and vexatious arrests: "*It is ordered*, that in all such cases, the plaintiff, in such action or suit, wherein common bail hath been or shall be so filed as aforesaid, plaintiff may deliver a declaration *by the bye*, against such defendant,

If bail be not justified, a declaration may be delivered the next term to plead without imparlance.

If process be returnable the last return, an imparlance.

Notice of declaration generally, and the indorsement on declaration *de bene esse*, held good.

“ in like manner as might have been done by the ancient
 “ course of this court. But that no other person except
 “ such plaintiff is or shall be capable of delivering a de-
 “ claration by the bye against any defendant, by reason
 “ of common bail being so filed by any plaintiff as afore-
 “ said.” And for the better distinguishing by whom
 common bail shall have been filed in any action or suit;
it is further ordered, that from and after the last day of
 this term, in all cases where common bail shall be filed
 by the plaintiff for defendant by virtue of the said act,
 these words shall be written on the bail-piece, *viz. filed*
according to the statute, or words to the like effect.
R. M. 10 Geo. 2. Reg. 1. (b).

If special or
 common bail
 be filed by de-
 fendant, any
 person may
 declare against
 him by the
 bye.

When the defendant has filed *common* or *special bail*
 for himself, *any person* may deliver or file a declaration
 against him by the bye, at any time *during the term*
 wherein *the process* against the defendant is *returnable*,
sedente curiâ; and the practice hath been, that the plain-
 tiff, at whose suit the process is, might declare against
 the defendant in as many actions as he thinks fit, before
 the *end of the next term, after the return of the process*.
N. on the above rule. See 4 Burr. 2181. 3 T. R. 627.

Where bail is filed by the plaintiff according to the
 statute, this is not such a general bringing of the defen-
 dant into court, as will warrant any person except the
 plaintiff in delivering a declaration by the bye against
 him. *2 Str. 1027.* The plaintiff in the original action,
 must declare in *chief*, before he can declare by the bye.
6 T. R. 158. 7 T. R. 80. But any other person may de-
 clare *by the bye*, before the delivery of a declaration in
chief. 1 Crompt. 100.

Taking it out
 of office is
 waiver of irre-
 gularity.

Taking out of the office a declaration *by the bye*,
 which was delivered before *any* declaration in *chief*, is a
 waiver of the irregularity. *Archer v. Barnes, 3 East.*
342.

If after a plea
 in abatement
 the plaintiff
 enter a *casse-*
tur billa on
 the roll, he
 may during
 same term in
 which the writ
 is returnable
 deliver a de-
 claration by
 the bye.

To debt on a judgment, defendant pleaded in abate-
 ment she was executrix and not administratrix, on which
 plaintiff, 20th of *March*, entered on the roll *quod billa*
cassetur, et defendens eat sine die. On the 28th of *March*
 the same term, he delivered a declaration *by the bye*,
 which defendant refused to accept, but it was left with
 him. Motion to set aside proceedings for irregularity.
 The court said, the proceedings were regular; that the
 defendant was in court during the whole term, and con-
 sequently that the plaintiff might deliver a declaration

against him during the term, and discharged the rule.
Milles v. Andrews ad. 5 Term Rep. 634.

The plaintiff having sued out a writ *qui tam*, and declared in his own name only, the proceedings were set aside; and the court said, he must declare in the *original action*, before he can declare *by the bye*, and he cannot convert one species of action into another, in the first instance. *Delves qui tam v. Strange, 6 Term Rep. 158.*

Must declare in the original action before declaration by the bye.

The delivery or filing of a declaration *before special bail is put in*, is a waiver of the bail; unless the same is delivered or filed *de bene esse*; and if the bail have not justified, is an acceptance of them, unless delivered *de bene esse*. *N. on R. M. 10 Geo. 2. Reg. 2. (b).*

What is a waiver of bail?

If an *original* be sued out in one county, and the declaration laid in another, though it be good against the defendant, yet the bail are discharged, and not liable to a *sci. fa.* otherwise if by bill. *3 Lev. 235. 245.* So if plaintiff declare contrary to the *ac etiam* in the writ. *Ibid. N. on R. E. 2 Geo. 2. (a).*

What discharges bail by original.

Within what Time to declare.

The plaintiff must declare before the end of the term next after the return of the process, or the defendant may sign a *nonpros* (except in replevin) without entering any rule to declare, and the defendant shall have costs taxed as usual, *13 Car. 2. c. 2. s. 5.* and no rule to declare need be given in this court; either by *bill* or *original*.

Within what time to declare.

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The rule to declare in replevin may be served on any day before the time the rule is expired, and the plaintiff must declare within four days after such service. *Edwards v. Dunch, 11 East. 183.*

When rule to declare may be served, and when plaintiff may declare in replevin.

Mr. Justice Buller. By the general rules of law, a plaintiff must declare against a defendant within *twelve months after the return of the writ*. But by the rules of the court, if he do not deliver his declaration within *two terms*, the defendant may sign judgment of *nonpros*. Though unless he take such advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration *within the year*. *2 Term Rep. 112. Horley v. Lee. 3 Term Rep. 123. Perry v. Harvey.*

Plaintiff has 12 months to declare if defendant do not sign a nonpros.

The defendant cannot sign a *nonpros* unless he enter his appearance *within the term the writ is returnable*. *Cas. temp. Hard. 138. 2 Term Rep. 719.* And such

Until what time defendant cannot sign nonpros.

appearance may be entered at any time before the *first* day in the next *full* term.

When appearance may be entered as of the preceding term.

An appearance entered after the *essoign* day and before the first day of full term, may be entered as of the preceding term; and a nonpros entered after the second term, for want of declaring before the end of such term, is good. *Prigmore v. Bradley*, 6 *East*. 314.

Of obtaining Time to declare.

Time to declare may be obtained.

To prevent a nonpros being signed, the plaintiff may get a side-bar rule from the clerk of the rules, if the defendant is not in custody, the last day of the second term, for time to declare until the first day of the next term, for which pay 6s. 6d. serve defendant's attorney with a copy, or stick a copy up in the office if he does not appear: And he may have as many rules as he likes from term to term, but there must be two in a term, *viz.* one from the first day of the term, to the last day, and the other from the last day, to the first day of the next term. But the defendant having appeared by an attorney, may if he thinks proper, move the court, that the last rule may be peremptory, which is done by giving counsel instructions, on a brief for that purpose, with 10s. 6d. annexing an office-copy of the last rule to declare; draw up rule at the clerk of the rules, serve copy on plaintiff's attorney.

The rule in this court is absolute, in the first instance, and drawn up on a motion, paper signed by counsel, and is as follows:

Rule for time to declare.

A. B. } It is ordered, that the plaintiff have time (or
v. } further time) to declare until the first day, inclu-
C. D. } sive of the next term (or the last day, inclusive
of the present term) if the defendant be not in custody.

Prisoner.

This rule cannot be had where the defendant is a prisoner. But if the writ be against *two* others as well as the prisoner, and the *two* cannot be found, the court will grant rules for time to declare against the prisoner, until the other *two* be outlawed, upon affidavit that you are proceeding to outlawry with all due diligence and motion for that purpose, the rule is absolute in the first instance.

Notice of Declaration.

In all notices, care is to be taken that the *cause be properly named*, as well as the court in which the suit is instituted; and in notices of declaration, the nature of the action is to be expressed, and at whose suit prosecuted, and the time limited to plead such declaration. And that in case the defendant do not plead by such limited time, judgment will be signed against him by default. *R. T. 1 Geo. 2.* and to be directed to the defendant. In case the declaration be filed, and notice thereof given to the defendant or his attorney; it is deemed to be a *good* declaration from the time such notice was delivered, in which respect there is no distinction between a declaration in *chief*, and a declaration *de bene esse*. *Hutchinson v. Brown*, 7 Term Rep. 298.

Of the notice.

If a declaration be filed, and notice given, it is good from the time of notice, and no distinction, &c.

It will be irregular to file a declaration in the office, when the defendant's place of residence is known, *without a notice is given to him*. *Oldham v. Burrell*, 7 Term Rep. 26.

Not to be filed without notice.

Serving notice of declaration filed, together with the writ at the same time is irregular. 12 East, 116. *Stuart v. Lund*.

Notice of the declaration cannot be writ.

given with the

The notice must not be served on a Sunday. 8 East, 347. *Roberts v. Monkhouse*.

Cannot serve notice on Sunday.

Where a declaration was filed in the office, before the defendant's appearance, was indorsed, "*filed conditionally*," and judgment afterwards signed for want of a plea, the court held it regular, though the notice served on the defendant, was of a declaration generally. 8 T. R. 77.

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

Take notice, that a declaration was this day filed with the clerk of the declarations in the King's Bench office in the *Inner Temple, London*, conditionally (until special bail is put in and perfected,) as of this present term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of _____ and unless you plead

Notice of declaration *de bene esse*, where the action is bailable.

* If in the thereto in four days * from the date hereof, judgment country, eight will be signed against you by default. Dated this days. day of 1817.

Yours, &c.

R. S. attorney for plaintiff.

To Mr. C. D. the above-named defendant.

The like upon common process.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the King's Bench office, in the *Inner Temple, London*, conditionally, (until common bail is filed), as of this present *Trinity* term against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of l. and unless you appear and plead thereto, in eight days from the date hereof, judgment will be signed against you by default. Dated this day of 1817.

Yours, &c.

R. S. attorney for plaintiff.

To Mr. C. D. the above defendant.

In the King's Bench

A. B. plaintiff,
and

C. D. defendant.

The like upon common process, where bail or appearance is filed, according to the statute.

* If in the country, eight days.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the King's Bench office, in the *Inner Temple, London*, as of this present *Trinity* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of l. and unless you plead thereto in four days * from the date hereof, judgment will be signed against you by default. Dated this day of 1817.

Yours, &c.

J. S. attorney for the plaintiff.

To Mr. C. D. the above defendant.

This notice will do where bail is perfected: or for a declaration filed by the bye, only say "*filed by the bye.*"

If filed of another term.

If the declaration be delivered of *Trinity*, to plead in *Michaelmas*, then say, unless you plead thereto within the first four days of next *Michaelmas* term, judgment will be signed against you by default.

How to indorse Declaration.

When a declaration is delivered to the attorney for the defendant, it is regular to indorse on it *the time* for defendant to plead thereto. Therefore if the declaration be delivered *de bene esse* or *filed*, it should be indorsed, as thus. Usual to indorse declaration.

This declaration is delivered (or filed, as the case may be) *de bene esse*, and the defendant is to plead hereto in *four days* (or eight days in a country cause) otherwise judgment. If delivered de bene esse bailable or not.

This declaration is delivered *by the bye*, and the defendant is to plead hereto in *four days*, otherwise judgment. By the bye.

The defendant is to plead hereto in *four days* (or eight days, as the case may require) otherwise judgment. If in chief.

The defendant is to plead hereto within the first four days of next term, otherwise judgment. If with an imparlance.

Of intituling and laying the Days in Declaration.

It is usual, when the cause of action will admit of it, to entitle the declaration *generally* of the *term* in *which the writ is returnable*; but it should always be intituled *after* the time when the cause of action is stated to have accrued: therefore where the cause of action is stated to have accrued *after* the *first* day of the *term* in which the *writ is returnable*, the declaration should be intituled of a subsequent day in that term, (*a*) and not of the term *generally*; for a *general* title refers to the *first* day of the *term*; upon such a title it would appear, that the action was commenced *before* the cause of it accrued. Yet where the cause of action was stated to have accrued on the *first* day of *term*, the court on demurrer held, that the declaration might be intituled of the *term generally*, for the delivery of the declaration is the act of the party; and in ancient times, when the practice was to declare *ore tenus*, it could not have been delivered till the sitting of the court; so that the cause of action might well have accrued, before the actual delivery of the declaration. *Pugh v. Robinson*, 1 Term Rep. 116. Vide 2 Lev. 176. Where

If improperly intituled.

(a) As Saturday next after the morrow of All Souls in Michaelmas term in the 57th year, &c.

a declaration is improperly intituled, the plaintiff may have it corrected, on an affidavit of the fact. *Symonds v. Parminter and another*, 1 Wils. Rep. 78.

Or may be set right.

Or it may be set right at the instance of the defendant: Thus, where the declaration is intituled of the term generally, and the defendant pleads *plene administravit*, or a tender made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made *between* the first day of the term to which the bill relates, and *the day of suing out the writ*; he has a right to call upon the plaintiff, to entitle his declaration properly, *Cas. temp. Hard.* 141. or to make up the paper book, with a memorandum according to the truth of the fact, *Smith v. Key*, 1 Str. 638. In *Smith v. Raydon*, M. 12 Geo. 1. the court ordered a special memorandum to be made, in order to give the party leave to plead a tender. Cited in 1 Wils. 39.

The defendant may call on plaintiff to entitle his declaration.

The defendant has a right to call upon the plaintiff to entitle his declaration agreeable to the *true time* of delivering it to the defendant. *Thompson v. Marshall*, 1 Wils. 304.

Ought to be intituled the term in which writ is returnable.

The court held that a declaration ought to be intituled of the term in which the writ is returnable (for it is to be considered as delivered *nunc pro tunc*): and if not, to prevent the plaintiff's *further claim*, the defendant may have a *judge's order* for that purpose. And where a writ was served, returnable in *Michaelmas* term 1788, the declaration was not delivered till *Hilary*; and including a debt due to the plaintiff from *Michaelmas* to *Hilary*, it was held, he could *not* recover *that* debt, for he ought to have intituled his declaration of the term in which the writ was returnable. *Smith v. Mullen*, 3 Term Rep. 624.

If bill filed against an attorney in vacation.

If a bill be filed against an attorney in *vacation*, the day of filing it may be inserted in a special memorandum, if the cause of action *accrued in vacation*. Vide *Proceedings against Attornies*. 5 Term Rep. 325. *Dodsworth v. Bowen*.

FORMS OF DECLARATIONS.

DECLARATIONS in *assumpsit* in common use, those by and against executors, administrators, assignees of bankrupt, &c. as also on promissory notes, are to be met with in my Modern Pleader, (2d Ed.) a book calculated for the

office of an attorney, with useful notes, and the evidence to support each declaration.

London, (ss.) C. D. was attached to answer A. B. in a plea of trespass on the case, &c. and thereupon the said A. B. by E. F. his attorney, complains, *For that whereas* one T. G. on the day of Payee against the acceptor on a bill of exchange, by original.

in the year of our Lord 18 , to wit, at *London* aforesaid, in the parish of *St. Mary-le-bow*, in the ward of *Cheap* according to the usage and custom of merchants from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to the said C. D. by the name and addition of *Mr. C. D. merchant, Milk-street, London*, by which said bill of exchange he the said T. G. then and there requested the said C. D. three months after the date thereof to pay to the said A. B. or order, the sum of 80l. for value received; and then and there delivered the said bill of exchange to the said A. B.; which said bill of exchange the said C. D. afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants; by means whereof, and according to the said usage and customs of merchants, he the said C. D. then and there became liable to pay to the said A. B. the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof, and being so liable, he the said C. D. in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook and then and there faithfully promised the said A. B. to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his acceptance thereof. *And whereas also* the said C. D. afterwards, to wit, on, &c. at &c. Add a count adapted to the consideration given for the bill, and for money had and received, and common conclusion, but no pledges.

London (ss.) A. B. complains of C. D. being in the custody of the marshal, &c. of a plea, that he render to him, the said A. B. 800l. of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; and thereupon the said A. B. by E. F. his attorney, complains, *for that whereas* the said C. D. heretofore, to wit On bond, obligee against obligor by bill.

on the day of in the year of our Lord 1817, The exact date of the bond.

R

Profert.

to wit, at *London* in the parish of *St. Mary-le-Bow* in the ward of *Cheap*, by his certain writing obligatory, sealed with the seal of the said C. D. and now shewn to the court of our said lord the king, before the king himself, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said A. B. in the said sum of *l.* as above demanded to be paid to the said A. B. when he should be thereunto afterwards requested. Yet the said C. D. (although often requested so to do) hath not yet paid the said sum of *l.* above demanded, or any part thereof, to the said A. B. but to pay the same, or any part thereof, to the said A. B. he the said C. D. hath hitherto wholly refused, and still refuses so to do, to the damage of the said A. B. of 10*l.* and therefore he brings his suit, &c. Pledges, &c.

Declaration by the assignee of the sheriff on a bail-bond by bill against the principal.

This form will do for one in Middlesex, as altered in the margin, and say sheriff instead of sheriff, precept instead of writ.

* A certain precept of our lord the king, called a bill of Middlesex.

* Whereby the sheriff was commanded.

Sheriff.

(a) *London*, (ss.) T. W. assignee of J. A. Esq. and T. S. Esq. sheriffs of the city of *London*, according to the form of the statute in such case made and provided, complains of W. B. being in the custody of the marshal of the Marshalsea of our lord thenow king, before the king himself, of a plea, that he render to the said T. assignee as aforesaid, the sum of *l.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; for that whereas the said T. on the day of in the 57th year of the reign of our Lord the now king, sued and prosecuted, out of the court of our said lord the king, before the king himself, the same court then and still being holden at *Westminster*, in the county of *Middlesex*, against the said W. a certain writ of our said lord the king, called a *latitat*, directed to the said sheriffs of *London*^b, by which said writ, our said lord the king commanded the said *sheriffs* to take the said W. if he should be found in their bailiwick, and keep him safely, so that they might have his body before our said lord the king at *Westminster*, on next after to answer the said T. in a plea of trespass, and also to a bill of the said T. to be exhibited against the said W. for *l.* on promises, according to the custom of his majesty's court, before his said majesty, and that the said *sheriffs* should then have there that writ, which said writ, afterwards, and before the delivery thereof, to the

(a) If the assignment be made in term time, and you declare on the bond in that term, the declaration must be intitled specially, or it will be demurrable. 1 *Term Rep.* 116. 7 *Term Rep.* 474.

'said *sheriffs of London*, to be executed as is hereafter Sheriff mentioned, was marked and indorsed for bail for I. by virtue of an affidavit of the cause of action of the said T. in that behalf, before then made and duly affiled of record in the said court of our said lord the king, before the king himself, according to the form of the statute in such case made and provided, (a) and which said writ so indorsed, afterwards, and before the said return thereof, to wit, on the day of , in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said J. A. and T. S. then *sheriffs of the said city of London*, who then and from thence, until, and at and after the said return of the said writ, were sheriffs of *London*, in due form of law to be executed; by virtue of which said writ, the said J. A. and T. S. then being sheriffs as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at *London* aforesaid, in, &c. and within their bailiwick, as such sheriffs, to wit, at, &c. aforesaid, took and arrested the said W. by his body, and then and there detained him in their custody as such sheriffs, at the suit of the said T. for the cause aforesaid; and the said W. being so arrested, and in custody of the said J. A. and T. S. so being sheriffs as aforesaid, by virtue of the said writ, at the suit of the said T. the said J. A. and T. S. afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at *London* aforesaid, in, &c. and within their bailiwick, as such sheriffs, to wit, &c. aforesaid, took bail for the appearance of the said W. at the return of the said writ, according to the form of the statute in such case made and provided, (b) and on that occasion, the said W. then and there, to wit, on the day of in the year last aforesaid, at *London* aforesaid, in, &c. by his certain writing obligatory, commonly called a bail-bond, sealed with the seal of the said W. and now shewn to the court of our said lord the king, before the king himself here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said J. A. and T. S. so then being sheriffs of the said city of *London*, as aforesaid, as such sheriff, by the name, description, and addition of J. A. and T. S. esqrs. sheriffs of *London*, in

The date of the bond.

Sheriff of the county of Middlesex.

Sheriff

Date of bond.

County of Middlesex.
Sheriff of the county of Middlesex.

(a) 12 Geo. 1. c. 29.

(b) 23 H. 6. c. 9.

Set forth the
condition.

the penal sum of 1. of good and lawful money of *Great Britain*, to be paid to the said sheriffs, or their certain attorney, executors, administrators, or assigns, when he the said W. should be thereunto afterwards requested, with and under a certain condition thereunder written, that if the said W. should appear before our said lord the king, at *Westminster*, on next after , to answer the said T. in a plea of trespass, and also to a bill of the said T. to be exhibited against the said W. for 1. upon promises, according to the custom of the said court of our said lord the king, before the king himself to be exhibited, that then the said obligation should be void, otherwise should be and remain in full force and virtue, as by the said writing obligatory, and the condition thereof (reference being thereto had,) may more fully and at large appear. And the said T. in fact saith, that the said W. did not appear before our said lord the king, at *Westminster*, on next after , in the condition of the said writing obligatory mentioned, according to the exigency and effect of the said writ, but therein wholly failed and made default, whereby the said writing obligatory became forfeited; and the said T. further saith that the said writing obligatory being so forfeited, and the money therein specified, remaining unpaid and unsatisfied to the said *sheriffs*, they the said J. A. and T. S. being then *sheriffs of the city of London* as aforesaid, afterwards, to wit, on the day of in the year aforesaid, to wit, at *London* aforesaid, in, &c. at the request of the said T. the plaintiff in the said suit, by an indorsement on the said writing obligatory, duly made and attested in the presence of two credible witnesses, and sealed with their seal of office of *sheriffs* of the said city of *London*. assigned the said writing obligatory to the said T. according to the form of the statute in such case made and provided; as by the said assignment indorsed on the said writing obligatory as aforesaid, and duly stamped before the commencement of this suit, according to the form of the statute in such case made and provided, (a) and to the court of the king, before now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by means whereof, and by force of the statute in such case made and provided, an action hath accrued to the said T. as assignee of the said J. A. and T. S. so

Sheriff.

Sheriff of the
county of
Middlesex.

Date of as-
signment.

Sheriff.

(a) The assignment must be stamped before the action is brought. 4 *Ann.* c. 16. s. 20.

being sheriffs of the said city of *London*, as aforesaid, to Sheriff demand and have of and from the said W. the said sum of l. above demanded; yet the said W. (although often requested so to do,) hath not as yet paid the said sum of l. above demanded, or any part thereof, to the said J. A. and T. S. before the said assignment, or to the said T. assignee as aforesaid, or either of them, since the said assignment, but he hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same, or any part thereof to the said T. assignee as aforesaid, to the damage of the said T. assignee as aforesaid 10l. and therefore he brings his suit, &c. Pledges, &c.

If the bond be assigned by the *late sheriffs* (add those words,) and that they assigned the same to the plaintiff; and instead of the words *now being sheriffs*, say (*then being sheriffs*;) the *venue* may be laid in *London* or *Mid-dlesex*, although the arrest and assignment were made in any other county. 2 *Ld. Raym.* 1455. 2 *Str.* 727. If by the late sheriffs.

Oxfordshire (ss.) A. B. complains of C. D. being in, &c. For that the said C. D. on the day of , in the year of our Lord 1817, to wit, at , in the said county, with force and arms, &c. made an assault on the said A. B. and then and there beat, bruised, wounded and ill treated him the said A. B. in so much that his life was then and thereby greatly despaired of, and other wrongs to him the said A. B. then and there did, against the peace of our lord the now king, and to the said A. B. his damage of l. and therefore he brings his suit, &c. Pledges, &c. Declaration for a common assault.

London (ss.) A. B. complains of C. D. being, &c. For that the said C. D. on the day of , in the year of our Lord 1817, with force and arms, &c. made an assault upon the said A. B. to wit, at *London* aforesaid, in the parish of *St. Mary-le-bow*, in the ward of *Cheap*, and then and there beat, bruised, wounded and ill-treated him the said A. B. and then and there imprisoned him, and him the said A. B. in prison there without any reasonable or probable cause whatever, kept and detained her for a long time, to wit, for the space of ten days then next following, contrary to the law and custom of this realm, and against the will of the said A. B. (add the above count for a common assault) For an assault and imprisonment.

London (ss.) A. B. complains of C. D. being in the custody, &c. of a plea of trespass on the case. For that Declaration in trover for plate.

The day is not material. *whereas* the said C. D. heretofore, to wit, on the day of , in the year of our Lord 1817, at *London* aforesaid, in, &c. was lawfully possessed as of his own property of certain plate, to wit, one tankard, and one mug of the value of 1. of lawful money of *Great Britain*, and being so possessed thereof he the said A. B. afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. came to the possession of the said C. D. by finding; yet the said C. D. knowing the said goods and chattels to be the property of the said A. B. and of right to belong and appertain to him, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said A. B. in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the said A. B. (although often requested so to do), and afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in, &c. converted and disposed of the said goods and chattels to his own use, to the damage of the said A. B. of 20l. and therefore he brings his suit, &c. Pledges, &c.

OF THE VENUE.

- Venue.** VENUE (*vicinetum* or *visnetum*) is the place from whence a jury are to come to the trial of causes, which is generally some neighbouring place, *Locus quem vicini habitant*; from whence it is called *vicinetum* or *venue*.
- Venue by bill is local or transitory.** The venue is either *local* or *transitory*; *local*, when the action could only have arisen in a *particular* county, and *there* the venue must be laid, or the defendant may demur to the declaration, 1 *Wils.* 265. *Thrals v. Cornwall*; or the plaintiff on the general issue will be nonsuited at the trial. *Cow. Rep.* 410. But where the action might have arisen in *any* county, it is *transitory*, and the plaintiff may in *general* lay the venue wherever he pleases; subject to its being changed by the court, if not laid in the very county where the action arose. 1 *Saund.* 74 (2).
- Real actions to be laid in the proper county.** All actions, *real* or *mixed*, as "trespass, quare clausum fregit, ejectment, waste, &c." must be laid in the *county* where the *lands lie*. *Bract.* 189. 414. So debt for rent, by the assignee of the lessor, against the lessee, is local, and will lie no where but in that county where the

lands are. 1 *Wils.* 165. *Thrale v. Cornwall, Cro. Car.* 183. (a)

The venue by *original* must be laid in the county where the *original* is issued, and where the action is intended to be tried, otherwise the plaintiff will lose his bail. The loss of bail.

On all *personal actions*, as "debt, detinue, assault, deceit, trover, and conversion, account, slander, and the like," the plaintiff may declare in *what county* he pleases. *Co. Litt.* 282. So against a *sheriff for a false return.* 1 *Wils.* 136. If a personal action be founded upon a thing done out of the realm, it may be brought in any county, and shall be alledged at such a place, in such a county: as if debt be upon a bond or bill made at *Hamburg*, it may be alledged at *H. viz. at Islington in the county of Middlesex.* *Latch* 5. *Salk.* 660. 659. *Lutw.* 950. 2 *Cro.* 76. Personal actions not local.

When an action is for a *transitory thing*, it may be brought in any county, as if it be upon a *covenant or contract, or debt at large; for debitum ex contractus sunt nullius loci.* 7 *Co.* 3, a. 2 *Inst.* 229. 231. Transitory thing.

When an action is founded upon *two things in different counties*, both material to the maintenance of the action, it may be brought in the one county or the other. 7 *Co.* 2, a. *Bulwer's case.* *Dy.* 31, b. 40, a. *Salk.* 669. As if an arrest be in one county, and an escape in another. 1 *Lev.* 114. So in an action for a false return of *non est inventus*, where the sheriff was in company of the party. 2 *Mod.* 23. So if the matter in one county is dependant upon matter in another, the plaintiff may have the action in the one county or the other. 7 *Co.* 1, b. As if two conspire to indict another, and make the execution of the conspiracy in another county, conspiracy lies in the one county or the other. 7 *Co.* 1, b. So for maliciously suing an execution in *Middlesex*, whereby he was arrested in *Dorsetshire.* *Cro. Eliz.* 574. So if an action on the case be against the sheriff of *Denbighshire*, for not arresting a man upon a *capias utlagatum* to him directed in *Denbighshire*, upon which he returned *non est inventus*, it When the action is founded on two things, in different counties, where to be brought.

(a) So if debt or covenant be brought by the lessor or his personal representatives, or by the grantee of the reversion against the assignee of the lessee, it is local. 6 *Mod.* 194. *Latch*, 197. 1 *T. R.* 583. 2 *East*, 580.

may be in *Denbighshire* or in *Middlesex*, where the return was made. *Hob.* 209.

Several facts in different counties. Where there are several facts *material* to the plaintiff's action arising in different counties, he may bring his action of covenant in *either*. *The Mayor of London v. Cole*, 7 Term Rep. 583.

If local action tried in a wrong county. If a *local* action be brought and tried in a *wrong county*, the defect is aided after verdict, by stat. 16 & 17 Car. 2. c. 8. *Ibid.*

Matter of record. If there be matter of *law* or *record*, and matter *in pais* in different counties, plaintiff has his election. *Griffiths v. Walker*, 1 Wils. 336. *Scott v. Brest*, 2 Term Rep. 241.

Action on lease for rent. In an action upon a lease for rent, founded on the privity of contract, as in *debt* by the lessor against the lessee, 6 Mod. 194. 2 Str. 776, or his executor in the *detinet* only, *Gilb.* 403, or in covenant by the lessor, 3 Lev. 154, or grantee of the reversion, 1 Saund. 241. 6. n. 6. against the lessee the action is *transitory*; and the venue may be laid in *any county*, at the option of the plaintiff.

If it arise partly in one county, and partly in another. *Holt, C. J.* said, if a cause of action arises *partly in one county*, and *partly in another*, it is in the election of the plaintiff to lay it in which county he pleases. As if a country chapman sends a letter to a tradesman in *London*, to send him goods into the *country*, he delivers them accordingly, and they come to the chapman's hands, there the cause of action arising in both counties, he may lay it in either. 12 Mod. 76.

If assault happen abroad, may lay venue in London. If an assault and imprisonment happens at *Minorca*, it may be laid at *London*, in the parish of St. Mary-le-bow, in the ward of Cheap; *Fabricas v. Mostyn*, Hil. T. 1775; and if the plaintiff is banished from *Minorca* or *Carthage*, it may be laid in *Minorca*, to wit, at *London*, &c. *Cowp. Rep.* 178.

Transitory actions. Every *transitory action* may be laid in any county in *England*, though the matter arise beyond the seas. *Ibid.* 181. But if it should be such an action as renders it necessary to state where it arose, as on a deed, bill of exchange, &c. the *real place* may be alledged; as for instance, if on bond, it should be stated to have been made at *Fort St. George* in the *East Indies*, to wit, at *London*, in the parish of St. Mary-le-bow in the ward of Cheap: For if the bond be stated to have been made in *London*, and, on oyer, it appear dated at *Fort St. George*,

or the like, it would be bad on special demurrer. *Ibid.*
178. 3 Term Rep. 387. *Mellor v. Barber.*

It is said, a venue cannot be laid in *Wales* in a transitory action, the cause whereof did arise in *England*.
Lill. P. R. 783.

A declaration was laid in *Norwich*, but *Norfolk* in *Norwich*.
the margin, inquiry executed there; court held, it was
helped by stat. 4 & 5 Ann. c. 16. *Howes v. Haslewood*,
Com. 155.

A. by deed executed in *London* for the securing the repayment of money lent to *B.* was appointed receiver of *B.*'s rent in *Middlesex*, with a pretended salary, which enabled him to retain usurious interest. He received the rent in *Middlesex*, but settled the account in *London*, and there paid the balance, on which the usurious interest is allowed. The offence is completed in *London*, and the venue in a *qui tam* action for the penalty is properly laid there. *Scott qui tam v. Brest*, 2 Term Rep. 238. *Vide Douglas* 223.

If rent be received in *Middlesex*, and account settled in *London*, in an action for usury.

In an action for infringing a patent, venue in *Middlesex*, the defendant cannot change it into any other county; for it is manifest that the *substratum* of the action, namely, the patent, is at *Westminster*. *Cameron v. Gray*, 6 Term Rep. 363.

In an action on a patent.

There are some actions of a transitory nature, wherein the venue, by act of parliament, must be laid in a particular county. Thus by the stat. 13 Eliz. c. 5. s. 2. "in any declaration or information, the offence against any penal statute shall not be laid to be done in any other county, but where the contract or other matter alleged to be the offence, was in truth done; and every defendant in such action or information, may traverse, and allege that the offence was not committed in the county where it is alleged, which being tried for the defendant, or if the plaintiff be thereupon nonsuit, then the plaintiff shall be barred in that action or information."

Venues local by act of parliament.

And by the stat. 21 Jac. 1. c. 4. "in all informations to be exhibited, and in all bills, counts, plaints, and declarations, to be commenced against any person or persons, either by or on behalf of the king, or any other, for or concerning any offence committed, or to be committed against any penal statute, the offence shall be laid, and alleged to have been committed in

"the county where such offence was in truth committed, and not elsewhere."

To what the above statutes extend. The former of these statutes is holden to be still in force, and extends to all actions or informations brought by common informers, upon penal statutes, whether made before or after the 31 *Eliz.* 2 *T. R.* 238. 4 *East.* 385.

If venue removed, the action must be proved to have happened in the proper county. Though a penal action be removed out of the proper county, into another for trial, yet the cause of action must still be proved to have happened within the proper county where the venue is laid. *Robinson v. Carthwaite*, 9 *East.* 296.

The venue in action on the pilot act is local. Debt on the stat. 32 *Geo.* 3. c. 39. (pilot act) for penalties, for continuing in the charge of vessels, without being licenced, the venue must be laid in the county where the offence was committed. *Barber qui tam v. Tilson*, 3 *Maule and Selw.* 429.

As to the venue in an action for driving away a distress. In an action on the stat. 1 & 2 *P. & M. c.* 12. for driving a distress out of the hundred in which the cattle were distrained, being in one county, and the hundred into which they were driven in another, the venue must be laid in the latter county. 2 *Campb. N. P. Rep.* 266.

As to the venue in an action for selling coals. So an action on the stat. 3 *Geo.* 2. c. 26. for selling coals, as and for a sort which they really were not, must be brought in the county in which the coals were delivered, and not where they were contracted for. 4 *East.* 385.

As to actions against officers, &c. If actions are brought against any justice, mayor, or bailiff of any city, town corporate, headborough, portreeve, constable, tithing man, collector of subsidy, fifteenths, churchwardens, and other persons called sworn men, executing the office of churchwarden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, &c. the venue must be laid where the fact was committed, or the defendant must be found not guilty. Stat. 21 *Jac.* 1. c. 12. sect. 5. *Vide Str.* 446. *Vaughan*, 113.

Justices, &c. If an action be against a justice for any thing done by colour or under pretence of his office, though not strictly within the duty of his office, it comes within this act. *Daniel v. Wood*, 5 *Term Rep.* 1. *Vide Str.* 446.

Turnpike man, when ac- In an action of assault and imprisonment against de-

defendant who was a turnpike man, keeping a gate in the county of *Surrey*—the venue was in *Kent*. The plaintiff attempted to pass through the turnpike gate in a chaise, which defendant thought was hired, and for which he insisted upon the duty imposed by 25 *Geo. 3. c. 51.* upon post horses: the court held, it was a transitory action, and the venue laid right. *Bazing v. Skelton, 5 Term Rep. 16.*

But by the 13 *Geo. 3. c. 78. s. 81.* the general highway act, the venue must be laid in the county where the fact was committed. *Highway act, venue local.*

For actions against revenue officers, vide 9 *Geo. 2. c. 35. s. 26*; 20 *Geo. 3. c. 70. s. 34.* as to excise officers; as to custom house officers, 24 *Geo. 3. sess. 2. c. 47. s. 35.* 4 *Term Rep. 490. Rex v. Cartwright.* *Revenue officers.*

In an action on the case for a nuisance, the venue must be laid in the proper county. *Cro. Car. 133. Jones, 43.* *Nuisance.*

In an action against an attorney, for maliciously suing out a commission of bankrupt, the venue was laid in *London*; as the affidavit on which the commission was sued, was made in *London*, the venue was ordered to be changed from *London* to *Yorkshire*, on an affidavit, that all the witnesses lived in *Yorkshire*, and of the expence and inconvenience, the defendant agreeing to admit that the cause of action wholly arose in *Yorkshire*. *Holmes v. Wainwright, one, &c. 3 East. 329.* *To prevent expences, if a fact is admitted, venue may be changed.*

Where the cause of action partly arose in *Derbyshire*, and partly in *Ireland*, the court refused to change the venue from *London* to *Derby*, on an affidavit, that the cause of action arose in *Derby* and *Ireland*, and not in *London*, or elsewhere, than in *Derby* and *Ireland*. *Walker v. Wright, 4 East. 495.* Here it was not shewn, that there would be a particular convenience in having the cause tried at *Derby* rather than in *London*. *Arising partly in Derby, and partly in Ireland, refused to change it from London to Derbyshire.*

The county in the margin of the declaration will help, but not hurt. Hence if there be no venue laid in the body of the declaration, reference must be had to the margin; but where a proper venue is laid in the body, the word in the margin will not vitiate it. *Cas. Temp. Hard. 343, 344. 3 Term Rep. 387. Mellor v. Barber.* *If no venue be laid in the body of the declaration.*

Where an attorney is plaintiff, and sues in his own court by attachment of privilege, he may lay the venue in *Middlesex*, and it cannot be changed. *Pope v. Redfearne, one, &c. 4 Burr. 2027. 3 T. Rep. 573.* But an attorney de- *Attornies.*

fendant has not the privilege of changing the venue into *Middlesex*, where it is laid in another county. *Ibid.* 2 *Str.* 1049. *contra.*

Debt for or
against lessee,
or assignee.

Debt for rent against the lessee, on indenture laid to be made at *London*, for the demise of lands in *Surrey*. The action was laid in *London*. On demurrer it was held, that the plaintiff had his election to bring it in either; otherwise had it been against an assignee who is chargeable only on the privity of estate. *Paterson v. Scot*, 2 *Str.* 776.

For forging a
will.

Case for forging a will brought in *Middlesex*; the land comprised in it lay in *Suffolk*, the venue was changed into *Suffolk*. *Ray*, 33.

OF CHANGING THE VENUE.

Court will not
change the ve-
nue to any of
the four nor-
thern coun-
ties, previ-
ous to spring
circuit.

THE stat. of 6 R. 2. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, impowered them to change the venue, if required, and not to insist rigidly on abating the writ, which practice began in the reign of *James* the first, 2 *Salk.* 670, and this power is discretionally exercised, so as *not to cause but prevent a defect of justice*; therefore the court will not change the venue if moved in *Michaelmas* or *Hilary term* to any of the four northern counties previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit, 1 *Wils.* 138. *Nichols v. Bolster*; nor can it be changed, but to a county where the whole cause of action arose, 1 *Wils.* 178. *Herring v. Durant*; which was a motion to change the venue from *London* to *Kent*, on an affidavit that the cause of action arose upon *Kingsbridge*, partly in the county of *Kent*, and partly in the city of *Canterbury*, and not elsewhere.

If plaintiff lay
venue in the
wrong county.

The defendant in all *transitory actions*, is generally allowed to change the venue, in case the plaintiff does not lay it in the proper county, where the whole cause of action arose; and he may change it from *London* to *Middlesex*, or *vice versa*. 2 *Str.* 857. *Gifford v. Lechmere*. 2 *Term Rep.* 275. In order therefore to change the venue, it is indispensably necessary that the cause of action shall be wholly confined to a single county.

In what ac-
tions venue
cannot be
changed.

In debt on bond, or other specialty, promissory notes, and bills of exchange, the court will not change the venue, because they are *bona notabilia* any where, unless there

be some special ground.^a *Say. 7. Kerk v. Broad. 1 Wils. 41. Anon. 1 Sid. 87. Carth. 400. Vent. 363. Barn. 480. 781. 483, 492.* So in covenant, *Leon. 307. Barn. 491.* So debt for rent. *Duplessis v. Chalk, 2 Str. 878.* So in actions for *scand. mag.* by a peer or peeress of the realm, *Lady Falconbridge v. Forest, 2 Str. 807. Ld. Ray. 1418. Salk. 668.* because the scandal reflects on him through the whole kingdom. So in an action for a libel published in a newspaper in one county, and circulated in other counties. *Pinkney v. Collins, 1 Term Rep. 571. Huskins v. Ridgway. S. P.* So where a libellous letter was written in *Berks*, but directed in *Surrey*, the venue being laid in *London*, court refused to change it in *Berkshire*, *Clissold v. Clissold, 1 Term Rep. 647.* So in an action against a carrier or lighterman, *2 Salk. 670*; or for an escape, *1 Sid. 87*; or false return, *1 Wils. 336. Griffith v. Walker, Cro. Car. 211. Sty. 107. Plowd. 37, b.* And the reason is, that defendant cannot make the usual affidavit, that the cause of action arose in a single county, and not elsewhere.

But in covenant upon a lease, where a view was necessary, the venue was changed to the county where the premises lay, though most of plaintiff's witnesses resided in the county where the venue was laid. *8 East. 268. Hodinot v. Cox.* Covenant.

But, it seems, the venue may be changed in an action not being by deed, or in any other action, the right of which is founded upon simple contract, *Say. Rep. 7*; therefore in an action on a policy of insurance, not being by deed, the venue may be changed. *Howarth v. Willett, 2 Str. 1180. Andr. 66. 2 T. Rep. 275.* In an action for a libel written in one place and sent to another, both in the same county, the venue was changed into the county in which it was both written and published. *Freeman v. Norris, 3 Term Rep. 306.* In what actions venue may be changed.
Libel.

The venue may be changed in an action for *crim. con.* upon the usual affidavit. *10 East 32. Guard v. Hodge.* Crim. con.

In an action for a libel in a letter written in *Yorkshire*, and sent by the post into *Germany*, the court ordered the venue to be changed from *London* to *Yorkshire*. *Metcalf v. Markham, 3 Term Rep. 652.* Libel written in Yorkshire, and sent to Germany.

Rule to change the venue from *Cumberland* to *London* on the common affidavit. Motion to discharge it on account of defendant's witnesses living in *Scotland*, and were willing to come to *Carlisle* to give evidence, and that there was no process to oblige the witnesses to come to *London*. After venue changed on the common affidavit, court will not alter it, though witnesses live in

Scotland, and are willing to come to Carlisle. *Court.* Here is the common affidavit, which is the law of the court, and as such, is the law of the land, and therefore denied the motion. *Fogoe v. Gale*, 1 *Wils.* 162.

In debt where both party's witnesses live in one county. But in debt on bond, where venue was laid in *London*, both plaintiff and defendant's witnesses lived in *Lincolnshire*, the court changed it into the latter county; saying when a serious defence was intended to be made, it was reasonable to grant such an application; defendant undertook to give judgment of the term, and not to bring error. *Foster v. Taylor*, 1 *Term Rep.* 781.

Where in proceeding by original against four, the venue is changed into a county palatine on the application of three of the defendants, who appear separately by one attorney, and undertake not to assign the want of an original for error: the court will require a similar undertaking from the fourth, who has appeared by a different attorney. *Eccles and another v. Holland and three others*, 4 *Maule and Selw.* 233.

WHEN A FAIR TRIAL CANNOT BE HAD, THOUGH LAID IN THE PROPER COUNTY.

No rule better established than all causes shall be tried in proper county where fact committed, unless a fair trial cannot be had there.

After verdict and motion for new trial.

THERE is no rule better established, than "that all causes shall be tried in the county, and by the neighbourhood of the place where the fact is committed;" and therefore the rule ought never to be infringed, unless it plainly appears, that a fair and impartial trial cannot be had in that county; where that does plainly appear, the court has power to depart from the general rule. *Sty. Prac. Reg.* 540. *M. 22 Car.*

After verdict and motion for a new trial, there having been a trial in the city of *Chester*, on shewing cause why the venue should not be changed from the city of *Chester* to the county at large, the court said, that in transitory actions they ought to change the venue, when it appears upon circumstances laid before them, that there is a probable ground to apprehend a fair, impartial, or at least a satisfactory trial cannot be had. Rule abs. *Mylock v. Saladine*, 3 *Burr.* 1564. In this case, verdict was against the weight of the evidence, and the damage excessive, and strong proof by affidavits of a general prejudice in the city. 1 *Black.* 480. *S. C.*

If on terms for taking short notice.

After time to plead given on terms of taking short notice of trial for the first sittings in the next term for *Middlesex*, in an action for words spoken of a justice of

the peace, by a candidate upon the hustings at a county election, a rule was obtained to change the venue into *Gloucestershire*. Motion to set it aside, as there could not be a fair and impartial trial in *Gloucestershire*. Court said, the rule ought to be set aside on either ground, and discharged the first rule. *Petyt v. Berkeley, esq. Cowp. Rep. 610.*

In *The King v. Harris and others*, on a rule to shew cause, why the cause (which was an information) should not be tried at the assizes for the county of *Gloucester* by a jury of the said county, instead of the city: the affidavit to found the motion stated *generally*, that they verily believed, that there could not be a fair and impartial trial had, by a jury of the city of *Gloucester*, without other reasons for entertaining such belief, which was an information for a misdemeanor, in refusing to admit several persons to their freedom of the city, who demanded and were entitled to it, to vote at the then approaching election for members, and whom the defendants did admit, after the election was over, but refused prior, and thereby deprived them of their right of voting at it. The prosecutors moved for this rule, supposing the citizens could not but be under an influence or prejudice in this matter, though there was a list returned of above 600 persons duly qualified to serve on the jury. *Lord Mansfield*. No two things can be more different than changing the venue, and continuing it as it was, with such a suggestion on the roll as is now proposed. Notwithstanding the locality of some sort of actions, or of informations for misdemeanors, if the matter cannot be tried at all, or cannot be fairly or impartially tried in the proper county, it shall be tried in the next adjoining county. The case of *Berwick* was determined upon the foundation, "That the writ of *venire facias* did not run there." And so it is likewise in the Cinque Ports. In these cases, there could be no trial had at all. But as the party cannot traverse such a suggestion, when entered by rule of court, there must be a clear and solid foundation for it. This general swearing is not a sufficient ground, especially as it is sworn there are 600 persons duly qualified to serve. The question is no general question of right, nor can it affect the corporation in future. Here is a want of foundation in fact of such a suggestion, and therefore no reason for the court's granting it. *Denison, J.* Where an impartial trial cannot be had in the proper county, the *venire* may be awarded to the next county. But there ought to be the clearest

Evidence of partiality, must be extremely strong, to change the venue in a criminal information.

evidence in the world, to ground such a suggestion upon; or it must arise out of the record itself. This does not arise out of the record, nor is there sufficient ground to support it. In this method of entering a suggestion upon the roll, the venue remains; and the court only award the venire to the next adjoining county, but they ought not to do it in this case; because the place of trial ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it; which is not the present case. *Wilmot, J.* The rule about entering suggestions upon the record is, "that the facts proving that a fair and impartial trial cannot be had in the ordinary course, must be themselves suggested upon the record." Rule disch. 3 *Burr.* 1330. See the form of the suggestion, 2 *Burr.* 834. *Rex v. Cowle.*

Wales. If a fair trial cannot be had in *Wales*, a certiorari will be granted. 1 *Str.* 704. *Rex v. Lewis.*

Poole. The action was laid in the county of *Poole*, and for a duty claimed to be due to the corporation; court ordered the venue to be changed to *Hampshire*, as a fair trial could not be had. *Mayor of Poole v. Bennett*, 2 *Str.* 874.

The motion. Therefore, in these cases, the motion is to try the cause in the next county, and not to change the venue.

Chester. It is now determined, that where a fair and impartial trial cannot be had in the county of the city of *Chester*, that the court will award the trial to be had in the county palatine of *Chester*. 7 *Term Rep.* 735. *Rex v. The Inhabitants of St. Mary.* 1 *Term Rep.* 363. *Rex v. Amery. Contra.*

Debt on bond. Debt on bond made at *Derby* to the intestate, the declaration alledged administration was granted to the plaintiff by the bishop of *Litchfield* and *Coventry*; and the venue in the margin in *London*. The defendant demurred generally. *Buller, J.* On a special demurrer, there might have been some doubt. But a bad venue, or the want of one, is cured by the statute of jeofails. *Grose, J.* Here the venue is laid in the body of the declaration at *Derby*; the addition of *London* in the margin will not vitiate it. *Mellor, adm. v. Barber*, 3 *Term Rep.* 387.

Bad venue, or want of one.

Changing Venue from an English, to a Welsh County, &c.

It was formerly doubted whether the court could Wales.
change the venue from an *English* to a *Welsh* county.
Dougl. Rep. 262. Pritchard v. Pugh.

The motion must be to change the venue into the The motion.
Welsh county, and not into the adjoining *English* county;
because of the affidavit: but after the venue is so changed,
the cause may be ordered to be tried in the next adjoining
English county. 2 *Black. Rep. 962. N. B.* The
practice in case judgment goes by default is, to direct
the inquiry to the *Welsh* sheriff.

Lord Mansfield, on a motion to change the venue It seems the
from *Middlesex* to *Denbighshire*, said, he did not at first venue may be
see why the court should refuse to change it into the changed from
next *English* county; as the same reasons seemed to *Middlesex* to
hold for doing that, as for changing it from one *English* *Denbighshire*.
county, into another *English* county. But Mr. J.
Denison had satisfied him there was a good reason for
refusing it: which is, that the form of the affidavit is so
religiously settled, that it cannot be departed from; and
in the case of changing it into the next *English* county,
they cannot swear in that form which is essentially re-
quisite on such motions; namely, That the cause of
action arose in the county which is prayed to change the
venue, and not elsewhere out of the said county, where
it was originally laid. *Waddington v. Thelwell, Esq.*
4 Burr. 2450.

But the court changed the venue from *Middlesex* into
Wales, no cause being shewn. *Ibid.*

And in a late case Lord Ellenborough said, that the May be
practice appeared now to be sufficiently established, for changed from
changing the venue from an *English* to a *Welsh* county an *English* to
(on the usual affidavit) to grant the rule absolute in the a *Welsh*
first instance. *Hopkins v. Lloyd, 6 East Rep. 355. E.* county.
45 Geo. 3.

The venue may be changed into a county palatine; Cannot in ge-
because the court can send down the record there by neral be
mittimus. *Lord Ray. 1418. 1 Wils. 222.* changed into
a county pala-
tine.

And if changed into a county palatine it is upon an
undertaking not to assign error for want of an ori-
ginal. 1 *Taunt. 432. Gibson v. M^c Bride, ib. 120.*
Cove v. Heaton.

Not to delay. It cannot be changed if it will delay trial, as to *Bristol*. (a) *Str.* 1180. *Howorth v. Willett*. Nor changed to a third county without consent. *Ibid.* 1216. *Southhouse v. Boak*.

If venue be laid in Bristol, it must be to try in next county. Motion to change the venue from *Bristol* to the next adjacent county. *Cur.* The way is not to change the venue, but to try it in the next county. *The Mayor, &c. of Bristol v.*—. In ejectment, 1 *Wils.* 77.

In what cases it may be changed from a county at large, into a city and county. The venue may not be changed from a county at large into a city and county, *Barnes*, 388.; but it has been changed from a county at large into *London*, *ib.* *Salk.* 670.; and it may be changed from one county and city into another county and city. *Prac. Reg.* C. P. 529.; but it cannot be changed into *Hull, Canterbury, &c.* because it is not known when an assize will be held there; nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county at large are held at the same place: but the reporter says, all this is in the discretion of the court. *Barnes*, 490. But where the assizes are held twice a year, it is a matter of course to change the venue. *R. M.* 1654. s. 5.

AS TO PRIVILEGED PERSONS.

Sergeants, barristers, attorneys, &c. **SERGEANTS** at law, *Barn.* 484; barristers, 2 *Show.* 176.: attorneys, *Salk.* 668.; or other officers of the court, suing as privileged persons, and laying the venue in *Middlesex*, have a right to retain it there, because their attendance is necessary at the courts at *Westminster*. *Pilking-ton v. Hamlin*, *Say.* 153. *Salk.* 668. But if the venue be laid in any other county, as *London*, 2 *Vent.* 47. *Salk.* 668.; or if such a privileged person sue as a common person (as by *capias*.) or *en autre droit*, as executor or administrator, or jointly with his wife or others, he has no such privilege. *Barn.* 479. 484.

If either of them be defendants. And if either of these persons are defendants, they have no privilege to have the venue changed into *Middlesex*. *Pope v. Redfern*, 4 *Burr.* 2037. *Yeardley v. Ros*, 3 *Term Rep.* 573. 3 *Mod.* 280. *Bisse v. Harcourt*. So in the C. P. And the reason is, that it is not necessary,

(a) There are no *Lent* assizes held at *Bristol*.

when defendant, to attend the trial in the country in person: but formerly this was otherwise. 2 *Str.* 1049. *Wigley v. Morgan, one, &c.* N. on R. M. 10 *Geo.* 2. *Reg.* 2.

It is said that a clerk of assize is on the same footing Clerk of assize. respecting the laying the venue when plaintiff, as an attorney. 2 *Ld. Ray.* 1253. *Salk.* 670.

That upon a cause removed by habeas corpus, out of On removal from cities, &c. the courts of *Canterbury, Southampton, Hull, Litchfield, or Poole*, if the action be transitory, the venue must be laid in the county of *Kent, Southampton, York, Stafford* or *Dorset*, where the town and county lieth. R. M. 1654. s. 9.

WITHIN WHAT TIME THE VENUE MAY BE CHANGED.

If the declaration be delivered so early in term, that If he has eight days in term the defendant has eight days in that term, he cannot move to change the venue the next term. *Asplin v. Gray*, 1 *Str.* 211. after declaration delivered.

The plaintiff after the *essoign* day of the subsequent Plaintiff after *essoign* day of term after appearance, shall not alter his own venue, though he would pay costs or give imparlance. *Mas. Livesey*, - 2 *Lill. Pract. Reg.* 778. *Str.* 211. 858. N. on R. M. 10 *Geo.* 2. subsequent term after appearance, not to alter venue.

The defendant cannot move to change the venue in any action until his appearance be entered; nor after plea pleaded, *Loft. Rep.* 321. although declaration be amended. *Lil.* 783. *Tidd.* 545. 3 *Bos. & Pul.* 12. Appearance must be entered before motion.

But after issue joined in debt on bond, and the cause in the paper for the sittings after *Easter term*, on motion in that term, it was changed from *London* to *Lincoln*, on the ground that the witnesses for both parties lived in *Lincolnshire*, and that there was a serious defence intended to be made; the defendant undertaking to give judgment of *Trinity term*, and not bring a writ of error. The pleas were, *non est factum, solvit post diem*, and usury. *Foster v. Taylor*, 1 *Term Rep.* 781. But the court will not change the venue "because the witnesses live in that county." *Ibid.* After issue it was changed, in debt, witnesses for both parties living in *Lincolnshire*, there being a serious defence.

That although the declaration be delivered seven days before the last day of the next preceding term, or after yet before the plea, upon oath made, the venue may be changed upon motion in the said transitory actions the Venue, when changeable in transitory actions.

next term after; and the defendant to plead to the new action as he should have done, without delay. R. Mich. 1654. *sect. 5.* "That the venue may be changed " (upon oath), though the defendant come in by exigent." *Ibid.*

May be changed, after order for time, but not when upon terms of short notice.

"The venue may be changed after an order for time to plead, though upon the terms of pleading issuably; but not after such an order when the terms are to plead issuably, and take short notice of trial for the first sittings in *London* or *Middlesex*, because there a trial would be lost. *Cowp. Rep. 511. Petyt v. Berkeley, Esq. Shipley v. Cooper, 7 Term Rep. 698. S. P.* If you obtain time to plead, the general mode is, to have it inserted in the order, "to be at liberty to change the venue."

Nor when on terms to try the first sitting in *Middlesex*.

The defendant obtained a rule to change the venue from *Middlesex* to *Gloucester*, where the cause of action arose; motion to set it aside. It was objected to, because the defendant was too late, inasmuch as he had previously applied for, and obtained an order to try the first sitting in *Middlesex*. The action was for words spoken at the time of an election for *Gloucester*, and it was said there could not be a fair and impartial trial. Lord *Manfield* said, upon either ground, the rule for discharging the rule obtained, should be made absolute. *Cowp. 511.*

Though plaintiff cannot change the venue, yet he may do it by amending.

Though the plaintiff cannot regularly move to change the venue, yet he may in effect do it by moving to amend, and it was done by striking out *Dorsetshire*, and inserting *Middlesex*. *Stroud v. Tilly, Str. 1162.* The court suffered the plaintiff to amend the venue, after defendant had changed it upon the common affidavit, *ib. 1202.* but never suffer it to be changed in debt, *ib. 878. Duplessis v. Chalk, Str. 878. Fitzgib. 166. Barn. 379.*

Amendment allowed in a penal action by altering the venue after remanet.

An amendment was allowed in an action for a penalty on the bribery act, 2 *Geo. 2. c. 24. s. 7*, after cause made a remanet, from *Yorkshire*, to *Kingston upon Hull*, it having been discovered that the solicitation of the bribe was there. *Petre v. Croft, 4 East, 432. Dover v. Meslaer, S. P. 435.*

In the C. P. the defendant cannot move to change the venue after having moved to put off the trial on account of the absence of a material witness. 2 *New Rep. 58. Pearse v. Pocklington.*

THE METHOD OF MOVING TO CHANGE THE VENUE.

No notice is necessary to be given to the plaintiff's attorney, previous to the motion to change the venue, but the client makes the following affidavit; which give to counsel, with 10s. 6d. for him to move; the rule is absolute in the first instance; in the evening draw up rule, pay for the same 6s. 6d. filing affidavit if sworn in the country, 2s. serve copy on plaintiff's attorney; the plaintiff's attorney will alter the declaration; if he does not, it will be considered as altered by the rule.

How to move to change the venue.

All rules for changing the venue in any action, should be drawn up upon reading the declaration. *Reg. Gen. Trin. Term, 1809. 11 East, 273.*

When rules to be drawn up.

After changing the venue, the defendant must plead, as he should have done before, without delay. *R. M. 1654. s. 5.*

After venue changed, when to plead.

In the King's Bench.

A. B. plaintiff,

and

C. D. defendant.

C. D. of the above-named defendant, maketh oath and saith, That the plaintiff's cause of action, (if any) mentioned in the declaration in this cause, arose in the county of S. and not in the county of K. (a) or elsewhere out of the county of S.

Affidavit.

Sworn, &c.

C. D.

A. B. } Upon reading the affidavit of the defendant,
v. } it is ordered that the action be laid in the
C. D. } county of S. upon the motion of Mr.

Rule to change the venue.

By the Court.

If in vacation, apply to a judge for an order, which will be made on producing the affidavit with a counsel's hand, the plaintiff being at liberty to change the same back again, on undertaking to give evidence in the for-

How in vacation.

(a) (*Where the venue is laid.*) *N. on R. M. 10 Geo. 2. Reg. 2. Sty. P. R. 543. Lil. P. R. 782.*

The affidavit must be positive, and not to be ief: and may be made by one defendant, although there be more. *Barn. 482.*

mer county, counsel 10s. 6d. rule 6s. 6d. serve it on plaintiff's attorney.

By original the venue cannot be changed, but on condition, that defendant does not assign the want of an original, for error.

Of bringing back the Venue by the Plaintiff.

Upon plaintiff's undertaking to give evidence of some matter in issue arising in the county, the rule to change the venue will be discharged.

Notwithstanding the defendant has it in his power to remove the *venue* from the place laid, to the place where the cause of action arose, the plaintiff may, on shewing cause, "undertake to give material evidence of some matter in issue, arising in the county wherein the action is laid:" in that case, the rule will be discharged; but if at the trial he fails therein, he must be nonsuited. 2 *Black. Rep.* 1031. For it is not enough to say, that the witnesses to prove the contract resided there. *Ibid.*

Where the venue has been changed in an action brought by the assignee of a bankrupt, the plaintiff's undertaking upon bringing back to *Middlesex*, is satisfied, by the production of the commission of bankruptcy, tested at *Westminster. Kensington*, assignee of *Thomas Chantler, a bankrupt*, v. *T. Chantler the younger*, 2 *Maule and Selw.* 36.

Formerly held plaintiff must bring back the cause before replication, but now it is otherwise.

It was formerly holden, that as the defendant must move to change the venue *before plea pleaded*; so the plaintiff must in like manner move to discharge the rule, on undertaking to give material evidence, before replication. *Dickenson v. Fisher*, *Str.* 858. But now it is otherwise, as appears by the following case.

The venue was brought back after two trials, on plaintiff's undertaking to give material evidence in London.

After the *venue* had been changed from *London* to *Lincolnshire* by defendant, the cause had gone down to trial at *Lincoln* assizes, where the plaintiff was nonsuited. New trial directed. The cause went down a second time to the assizes at *Lincoln*, and made a remanet for defect of jurors. There was a rule obtained for bringing back the *venue* to *London*, upon undertaking to give material evidence there. The objection made was, that it was too late after all these proceedings, and therefore the defendant moved to discharge that rule. Lord *Manfield* said, we desired the master to inquire into the practice, whether the plaintiff could bring back the *venue* after plea pleaded. He has met with two cases in *Str.* 858. *Dickenson v. Fisher*; and 162. *Stroud v. Filly*. We

think it an idle circuitry to put the plaintiff to move to amend his declaration, in order to come at an alteration in the venue: and if we permit him now to bring it back, he does it at his peril, because if he does not give material evidence in *London*, he must be nonsuited; and if it should appear to be a local action by statute, he will be nonsuited upon the opening. The former rule must stand, and take nothing by the latter. *Bruckshaw v. Hopkins*, *Cowp. Rep.* 409.

The undertaking is absolutely necessary, for it is not sufficient for the plaintiff to swear that his cause of action arose where the venue is laid. *French v. Coppinger*, 1 *H. Black. Rep.* 216.

Action of assumpsit, the venue was changed by a rule of court from *Middlesex* to *London*, and the rule was afterwards discharged on the plaintiff's undertaking to give in evidence some matter in issue, arising in the county of *Middlesex*, where the action was first laid; after which the defendant paid 7*l.* into court. The plaintiff produced an office copy of the rule, and the judge was of opinion that it was sufficient. *Watkins v. Towers & others*, 2 *Term Rep.* 276.

Rule for payment of money into court held sufficient.

So if the cause of action arose abroad, it is sufficient to prove it. *Gerard v. Roebeck*, 1 *H. Black. Rep.* 280.

The rule to change the venue was obtained, and the plaintiff's agent altered the issue accordingly, and delivered it over; and then he applied to bring back the venue to *Middlesex*: the court discharged the rule nisi but without costs. ——— v. *Boddington & al.* *M.* 20 *Geo. 3.* cited in *Crompton*.

If the issue is altered, cannot be brought back.

Originally it was required, that the plaintiff should give no evidence at the trial, but what arose in the county wherein the venue was retained. 1 *Keb.* 189. 1 *Sid.* 442. If he gave none such, he must have been nonsuited of course. But when it was laid down in *Swain's* case, 1 *Sid.* 405. that the plaintiff might lay his venue in any county wherein part of the cause of action arose, he was then bound only to give some evidence, and not the whole, in the county where the venue was laid, *Salk.* 669. 12 *Mod.* 515. which continues to be the rule at this day. And if the plaintiff fails to make good his undertaking, he is nonsuited now, which has the same effect as judgment for the defendant in a plea in abatement, *viz. quod eat sine die*, and the plaintiff must begin again. 2 *Black. Rep.* 1034.

Formerly it was required to give evidence in the county where in the venue was retained, or be nonsuited.

But since bound only to give some evidence; or be nonsuited.

If changed on a false affidavit. If the *venue* be changed by defendant, on the usual affidavit, when in fact it turns out part of the cause arose in another county, the court will order the *venue* to be brought back to the original place where laid. *Cailland v. Champion*, 7 Term Rep. 205.

But in such case plaintiff must give the usual undertaking. But though the *venue* be changed by the defendant upon a false affidavit, yet the court will not suffer the plaintiff to bring it back again into the county where first laid, without the usual undertaking, to give material evidence in that county. *Price, Bart. v. Woodburn*, 6 East, 433.

Rule for bringing back the *venue*. A. B. } Upon reading the rule to change the *venue*,
v. } and upon the undertaking of the plaintiff to give
C. D. } material evidence of some matter in issue arising in the county of (the county the action was first laid) it is ordered that the said rule be discharged. Upon the motion of Mr.

RULE TO PLEAD.

What. THE rule to plead is an order of the court, and intended to give the defendant notice when he is to plead. But if the defendant obtain a rule of court, or an order from a judge, for time to plead, this excludes any presumption that the plaintiff has not given him such notice: therefore in such case the court have held a rule to plead unnecessary. *Starkie v. Wilkes*, M. 7 Geo. 2.

Anciently they were two rules to plead given of four days each; the first *ad respondendum*; the second *ad respondendum peremptorie*. 2 Salk. 517. These were afterwards converted into one eight-day rule, *ibid*. But now by rule, *Trin. 1 Geo. 2*. four days only shall be allowed the defendant from the time of giving any rule to plead. When the rules to plead ran for eight days, the course of the court was to allow the four first only for pleas in abatement; but as to pleas in chief, it was sufficient if they came in any time before judgment signed. *Long v. Miller*, 2 Str. 1192.

Cannot be given on a Sunday.

The rule to plead cannot be given on a *Sunday*, or on the Purification; and if the rule expires on a *Sunday*, the defendant has all the next day to plead in. 1 Str. 86. *Anon*. But may now be given the day the declaration is filed, or delivered.

When Sunday In rules to plead in actions in general, a *Sunday* or a

holiday reckons as a day, except it be the last. 11 *East.* reckons as a day.
272. *Watken v. Beaumont.*

Before a plea in bar can be compelled, or a plaintiff become entitled to judgment for want of it, a rule to plead must be entered with the clerk of the rules. Rule must be given.

But if a defendant is bound by a rule or order of court to plead by a time therein limited, it is incumbent on him to plead by such time, although the plaintiff does not enter any rule to plead, or call for a plea. *N. on R. T.* If bound by an order.
5 & 6 *Geo. 2.*

If a rule to plead be entered the same term an amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered, which must be a four day rule. *Barton v. Moore,* If a rule be given and an amendment made, no new rule.
8 *Term Rep.* 87. *N. on rule M.* 10 *Geo. 2.* 2 *Salk.* 517.

In case it should be necessary for a term's notice to be given before plea, (as if four terms are elapsed,) then the rule to plead is to be given the day after the last day of the term after such notice, or within the four days. As for instance, before the *essoign* of *Hilary* notice is given that you intend to proceed after the end of the ensuing term, by giving a rule to plead; give the rule the 13th *Feb.* demand the plea, and if no plea, sign judgment, *Milbourn v. Nixon and others,* 3 *Term Rep.* 40. where the court held that although the judgment appeared of *Hilary* term, yet the defendant had the full benefit of the rule. In case of a whole term's notice to plead, rule to be given.

The rule is given by delivering a slip of paper to the clerk of the rules, with the title of the cause in this form: How given.

In the King's Bench.

A. B. }
v. } Rule to plead.
C. D. }

Form of the rule.

A. K. attorney.
— 1817.

Take it to the clerk of the rules in *Symonds Inn*; pay him for each rule 3s. which he enters in a book kept for that purpose.

The rule expires in four days inclusive, but no judgment can be signed until four days exclusive of the day it is given; and *Sunday* is to be accounted a day within the said rule (except it happen on the last day,) it may be given any time in term, or within four days after. When rule expires. Sunday.

It is not necessary to give a new rule to plead, if there be a judge's order for time to plead, or where the time When not necessary.

given by such order, does not expire till the first or second day of the next term; but in all other cases, there should be a new rule to plead, to warrant the judgment signed as of that term, in which it is so signed. *Gilb. Rep.* 318.

The clerk of the rules will accept a rule to plead on the *essoign day*, but such rule cannot be entered until the first day of term.

When rule to plead dispensed with.

The defendant may dispense with the rule, either by pleading in abatement, or in bar. *Brandon v. Payne*, 1 *Term Rep.* 690. 5 *Term Rep.* 661. *Lockhart v. Mackreth*, 6 *East*, 549. *Perry v. Fisher*.

After demand of plea.

The rule may be given after a demand of plea. 5 *East*, 547. *Maxwell v. Skervett*.

If defendant dies.

If defendant dies after rule given, and before interlocutory judgment signed, the suit is abated. 1 *Wils.* 315. *Wallop v. Irvin*.

When a rule necessary.

When a rule to plead has been once entered, and the cause stands over till another term without any further proceeding, a new rule to plead should regularly be entered in that term to entitle the plaintiff to sign judgment; for in this court all judgments must be entered the same term in which the rules are given. *Lancaster v. Frazer*, 1 *Maule and Selw.* 478.

If declaration has been amended.

When the declaration is amended, if a rule to plead be entered the *same term* the amendment is made, though before such amendment, it is sufficient; otherwise a new rule must be entered. 2 *Salk.* 517. 520.

DEMAND OF PLEA.

When plea must be demanded.

WHEN special or common bail is filed by the defendant, there must be a plea demanded in writing of defendant's attorney, before the plaintiff can sign judgment; although notice to plead be indorsed on the declaration, 1 *Wils.* 134. *Nott v. Oldfield*; and such demand must be delivered twenty-four hours before judgment can be signed by default. 1 *Black. Rep.* 50. 1 *Term Rep.* 454. *Dyke v. Burgoyne*. And if judgment be signed before such demand made, it will be set aside with costs; so ruled in *E. T.* 1783.

Demand of plea.

The demand of a plea must be in writing, and is to be delivered to, or left with the defendant's attorney, or agent in town; it is as follows:

In the King's Bench.

A. B.

v.

C. D.

The plaintiff demands a plea in this cause by

Yours, &c.

E. F. plaintiff's attorney (or agent).

— 1817.



If a declaration be filed *de bene esse*, and notice given to the defendant thereof, in that case, if the defendant does not file common bail within eight days, and plaintiff files it for him according to the *statute*, there is (a) no necessity to demand a plea before signing judgment. 8 *Term Rep.* 465. *vide page 237*.

When not necessary.

After a judge's order for time to plead, a demand of a plea in this case is not necessary, but judgment for want of a plea may be signed, if no plea filed or delivered within the time. *Pearson v. Reynolds*; 4 *East*. 571.

After an order for time, no demand.

A declaration was delivered 9th Nov. 1804, indorsed to plead in four days, and with a demand of a plea in writing on the back of the declaration, but no rule to plead was given till the 12th November; and on the 17th Nov. judgment was signed for want of a plea, without any other demand made of one motion to set aside proceedings for irregularity. *The Churchwardens of Edmonton v. Osborn*, 6 *Term Rep.* 689. was cited, where it was held that a demand of a plea may be made at the time of delivering the declaration: *Per Curiam*. The demand of a plea at the time of delivering the declaration has been held to be good; and though it be usual to give a rule to plead when the declaration is delivered, yet as the rule has been given, though given afterwards, whereby the defendant had more time to plead, there is no objection to it. *Rule disch. Maxwell v. Skervett*, 5 *East*, 547.

A demand of a plea indorsed on the back of declaration when delivered is good, and a rule to plead may be given afterwards.

The demand of plea is a waiver of bail: (b) therefore before demand is made, take care that bail is justified.

Demand of plea, waiver of bail.

A demand of a plea before the defendant has appeared,

Demand before appearance.

(a) Although the defendant's attorney inform the plaintiff's attorney, that he has taken the declaration out of the office.

(b) The demand of plea is an admission that defendant is in court and in a condition to plead. *Barnes* 92. *Lister v. Wainhouse*.

or the plaintiff filed common bail for him, is a nullity. *Cook v. Raven*, 1 Term Rep. 635. *Venn v. Calvert*, 4 Term Rep. 578.

Prisoners.

In the case of a prisoner in this court, that is in K. B. prison, there must be a demand of plea: if he is in custody of the sheriff, no demand is necessary. *Rose v. Christfield*, 1 Term Rep. 591. *Mr. J. Buller*. Also 6 Term Rep. 524. S. P.

When judgment may be signed.

Per Cur. The rule is, that judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. *Dyche v. Burgoyne*, 1 Term Rep. 454.

Court held, that, at all events, the plaintiff cannot sign judgment till the expiration of twenty-four hours after the demand of a plea. *Bowles v. Edwards*, 4 Term Rep. 118.

If a plea be demanded on Saturday, 24 hours to plead after demand exclusive of Sunday.

A declaration of *Michaelmas* term delivered to plead within four days of *Hilary*. On *Saturday*, 28th Jan. at six in the evening, a plea was demanded; and on *Monday* following at 12, judgment was signed for want of plea, but at two, same day, defendant pleaded the general issue. The only question was, whether defendant had till six o'clock on *Monday* to plead, or twenty-four hours after plea demanded, though that time expired on *Sunday*:—Court were of opinion, that defendant had twenty-four hours clear after the demand of the plea, exclusive of the whole of *Sunday*. Rule absolute, for setting aside the judgment. 4 Term Rep. 557. *Solomons v. Freeman*.

In custody of sheriff not necessary.

A demand of a plea is not necessary, in cases where the plaintiff sues the defendant in the custody of a sheriff, and the defendant without notice to the plaintiff, procures himself to be removed to a different custody. *Wilkinson v. Brown*, 6 Term Rep. 524.

OF OBTAINING TIME TO PLEAD.

To be obtained by a summons before a judge.

IF the defendant be not ready to plead by the expiration of the time allowed him for that purpose, his attorney or agent may obtain a summons from a judge (but it must be a day previous to the expiration of his time) to shew cause why the defendant should not have a week's time. (a) If such summons be returnable

(a) Summons, in term, 3s.; order 4s. 6d. In vacation, summons 4s.; order 4s. 6d.

before the plaintiff can sign judgment, it is a stay of proceedings, *Say. Rep.* 165; but it is otherwise when taken out or returnable, after the expiration of the time for pleading, provided the plaintiff proceeds. *Vide 2 Black. Rep.* 954.

An order for time to plead, if it be not drawn up and signed, needs not be noticed by plaintiff. *7 East.* 542. *Sedgewick v. Allerton.* When it need not be taken notice of by plaintiff.

A copy of the summons is to be served on the plaintiff's attorney, who will either indorse his consent thereto, or attend the judge; but defendant, in town causes, will be bound down to terms of taking short notice of trial, pleading issuably, and rejoining gratis, if plaintiff was in time to proceed to the trial, if not, only pleading issuably. Copy of summons to be served. Terms.

N. B. The plaintiff's attorney may (though it is very unusual) stay till the third summons before an order can be made. And if default is made on the third summons, the judge will, on affidavit of the service and attendances, make an order *ex parte*.

If the plea cannot be obtained in time, the judge will grant further time, if necessary, by a second summons, provided the plaintiff be not delayed. Further time may be obtained.

N. B. A month's time to plead is a *lunar month*, or four weeks, and not a *calendar month*. *3 Burr.* 1455. *Tullett v. Linfield*; and is reckoned inclusive of the day of the date of the order, but inclusive of the day on which it expires. Time how reckoned.

The order must be served in like manner as the summons.

If an order be obtained for time, the defendant must plead on the day the order expires, or the plaintiff may sign judgment, on the opening of the office the next morning. *Per Cur.* 45 *Geo.* 3. When to plead after order expires.

Where the defendant is an executor or administrator, the order will be for him not to plead any judgment, since the time for pleading was out, *8 Mod.* 308, for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demand. If defendant an executor or administrator.

In general, a summons or order will not operate as a stay of proceedings, where the object of it is collateral to the time for pleading, as to discharge the defendant out of custody, on filing common bail, &c. *Per Cur.* 28 *Geo.* 3. *K. B.*

What summonses are to be stamped.

Summons of any judge of any of the courts at Westminster (except for any particulars of plaintiff's demand, or for any stay of proceedings on payment of debt and costs, or for time to plead, reply, or rejoin, or on the application of any prisoner or insolvent debtor) to be stamped with a 1s. stamp. The order with a 2s. 6d. stamp. 44 Geo. 3. c. 98.

Issuable Plea within the Meaning of an Order.

When order to plead issuably.

When the defendant is under a judge's order to plead issuably, and pleads a plea which is not issuable, the plaintiff may consider it as a mere nullity, and sign judgment.

The judge's order does not confine the defendant to plead the general issue. 1 Burr. 605.

Nil debet and nul tiel record pleaded after an order.

To an action on the judgment, on an order to plead issuably, rejoin gratis, and take short notice of trial for the next assizes; the defendant pleaded *nil debet*, and *nul tiel record*: the master was of opinion, that these were issuable pleas under the order; that you might go to trial on the first, and give the day to produce the record the first day of the next term, in the replication.

Tender, &c.

A plea of tender has been deemed an issuable plea, 1 Burr. 59. *Kilwick v. Maidman*. And the general issue, and statute of limitations is held an issuable plea within the order. *Rucker v. Hannay*, 3 Term Rep. 124. *contra* 2 T. R. 390. *Studholm v. Hodgson*. A plea of stat. 23 H. 6. c. 10, is within the order. 1 Burr. 605. But where the defendant being under an order to plead issuably, and he pleaded several pleas, all of which were issuable, except one, plaintiff signed judgment, as for want of a plea; the judgment was held regular, because one plea was pleaded in disobedience of the order. *Waterfall v. Glode*, 3 Term Rep. 305.

Demurrer.

A real and fair demurrer is an issuable plea within the meaning of a judge's order, but a sham demurrer is not. *Gray v. Ashton*, 3 Burr. 1788.

Where the defendant was advised, that he had substantial ground of demurrer, the court set aside the judgment signed as for want of a plea upon terms. 7 T. R. 530. 1 East. 414. (a) S. C.

Special demurrer.

A judgment recovered in another court, or a plea in abatement, 1 Burr. 59. or a special demurrer, is not a

plea within such an order. *Berry v. Anderson*, 7 Term Rep. 530.

The meaning of the term pleading *issuably* is not merely pleading a plea on which issue may be taken, but such an one as goes to the merits: therefore the plea of alien enemy, is not such a plea. *Simeon v. Thompson*, 8 Term Rep. 71. It must be such a plea as the plaintiff may go to trial upon. *Foster v. Snow*, 2 Burr. 782.

If a defendant be under terms of rejoining *gratis*, and there is a real cause of demurrer to the replication, he may demur. 2 Str. 1185. *Dewey v. Sopp*.

If an executor be not confined by a judge's order to plead, no judgments confessed after rule to plead expired: he may plead such judgments confessed before, being issuable pleas. *Vide Barn.* 330. *Hughes v. Pellett*.

WHEN DEFENDANT OUGHT TO PLEAD.

If a declaration be delivered *de bene esse*, on common process, he is to plead in eight days after filing or delivery. *R. Trin.* 22 Geo. 3.

If *de bene esse* on special bail, if the action be laid in London or Middlesex, and the defendant lives within twenty miles of London, then to plead in four days (provided a plea is demanded.) *ibid*.

The defendant in a country cause is entitled to eight days notice to plead, although he has appeared, and is resident about two miles from London, *Holland v. Cooke*, 1 Maule and Selw. 566.

If the venue is laid in any other county, or the defendant lives above 20 miles from London, eight days. *Ibid*.

If entitled to an imparlance, to plead within the first four days of the next term, in all cases.

If plaintiff files common bail according to the statute, and then declares, defendant has four days to plead, (if declaration be delivered four days before the end of the term in which the writ is returnable,) and the venue is laid in London or Middlesex, and the defendant lives within 20 miles of London. But if the venue be laid in the country, or the defendant lives above 20 miles from London, then eight days. *Vide Rule, Trin.* 22 Geo. 3.

If declaration be delivered or filed with notice to plead within the first four days of term, the defendant has all

the morning of the fifth day to plead, and judgment cannot be signed till the opening of the office of the afternoon of that day.

But in any other part of the term, if the defendant do not plead *within the four days*, the plaintiff may sign judgment in the morning of the fifth day. *Shepherd v. Mackreth*, *E. 35 Geo. 3.*

On an order to amend. If there be an order to amend, the defendant shall have two days exclusive, to alter his first plea, or plead a-new.

Residence in Scotland. It appeared that defendant (whose usual residence was in *Scotland*) was arrested while casually in *London*, where he put in bail: the declaration was delivered to plead in four days, instead of eight: and on motion for an imparlance, Lord *Mansfield* said, no doubt but that it ought to be four days only; it should be deemed a residence in *London* where arrested. *Cutiff and another v. Gascoigne*, *4 Term Rep. 553.*

If rule expires on Sunday. If rule expires on *Sunday*, defendant has all the next day to plead. *Str. 86. Anon.*

Sunday or a holiday. Sunday, or any day on which the court does not sit, is to be accounted as one of the four days, unless it happens to be the last. *N. on R. E. 5 Ann. T. 1 Geo. 2.*

Abatement. If defendant pleads in abatement, he is to plead in four days inclusive of both days, whether rule to plead be given or not. *Jennings v. Webb*, *1 Term Rep. 277. 690. Brandon v. Payne.*

If last day Sunday. If the last of the four days happen on a *Sunday*, the defendant may plead in abatement the next day. *Lee v. Carlton*, *3 Term Rep. 642.*

If injunction. If the cause has been stayed four terms by injunction, no need of a whole term's rule to plead.

IMPARLANCE.

Definition. *Emparlance* or *imparlance*, is a desire or petition in court of a day to consider, or advise, what answer the defendant shall make to the action of the plaintiff; and nothing else but the continuance of the cause till a further day.

Imparlance, what is said to be. Imparlance is said to be when the court gives the party leave to answer at another time, *without* the assent of

the other party. *Com. Dig. title Pleader*, (D. 1). But the more common signification of imparlance, is time to plead, 2 *Show.* 310. 2 *Mod.* 62; and it is either general without saving to the defendant any exception, which is always to another term, *Mod.* 28; or special, which is sometimes to another day in the same term, 6 *Mod.* 8. with a saving of all exceptions to the writ, bill, or count, or of all exceptions whatsoever: which latter is called a general imparlance. The general imparlance is of course where the defendant is not bound to plead the same term; but a special imparlance is not allowed, without leave of the court. After a general special imparlance, the defendant may not only plead in abatement, of the writ, bill, or count, but also privilege. 1 *Lev.* 54. 12 *Mod.* 529. 5 *Mod.* 335. But such plea must be intituled of the term the declaration is filed.

It is ordered, that a special imparlance shall not be allowed the defendant without leave of this court first obtained. Rule, *E. 5 Ann.*

No special imparlance without leave.

Generally, if a writ be returnable the last return of the term, and the plaintiff declares (even in a bailable action) before the essoign-day of the next term, the defendant is entitled to an imparlance of course. *Philips v. Harding*, T. 24 *Geo.* 3.

If the writ be returnable before the last return of any term, and declaration not filed, and notice given four days exclusive before the end of such term, the defendant is entitled to an imparlance. *R. Trin.* 22 *Geo.* 3.

When entitled to an imparlance.

Writ returnable the last day of *Trinity* term, on which day, the bail were put in, but did not justify until 9th *Nov.* following, and no declaration *de bene esse* having been delivered before the essoign-day of this term; motion for time to plead till next term; and 1 *Crompt.* 130, was relied on. The court said he was not entitled to an imparlance. *Buller, J.* No laches can be imputed to the plaintiff for not declaring until the defendant is perfectly in court. The case cited happened in the Common Pleas; and that many of the cases published in *Crompt. Pract.* were hastily collected by himself, before he was at the bar, were never intended by him for publication, and were too loose to be relied on. Rule refused. *Rolleston v. Scott*, 5 *Term Rep.* 372.

If bail not perfected, may declare without imparlance.

On a declaration delivered of *Hilary*, there may be an imparlance to *Trinity* term, if defendant has not pleaded

Declaration of *Hilary*, imparlance to *Trinity*.

Writ returnable one term, declaration not delivered before essoign of the next imparlance.

before; for it is the course of the court. to give imparlance till the day of pleading. If a writ be returnable in one term, and the declaration is not delivered before the essoign-day of the second term, the defendant is not obliged to plead in the same term, but is entitled to an imparlance (except where bail is not perfected.)

If two defendants, and one cannot be found.

It a writ be taken out against two defendants, and one is arrested in the term of which it is returnable, but the other cannot be met with, so that it becomes necessary to take out another writ against him, returnable in the next term, either of them are entitled to an imparlance, as the plaintiff could not declare till both were in court. *5 T. R. 372. 2 Bos. and Pul. 126.* This practice, however, is confined to cases where special bail is required. *Per Cur. M. 42 Geo. 3.*

Refused on habeas corpus.

Court refused to grant an imparlance, where the cause was removed by habeas corpus. It was removed the 6th of November, and declaration delivered the 12th. *Wood v. Wenman, 1 Wils. 154. Salk. 515.*

If he removes the cause from an inferior court.

When the defendant removes the cause by habeas corpus from an inferior court, and the plaintiff does not declare until the next term, the defendant is not entitled to an imparlance. *Smith v. James, 6 Term Rep. 752.*

Arrest in London, residence in Scotland, must plead in four days.

Motion for an imparlance, the declaration had been delivered to plead in four days, instead of eight. It appeared that the defendant (whose usual residence was in Scotland) was arrested while casually in London where he put in bail.—The question was, whether the rule, *M. 10 Geo. 2.* ordering that where defendant resides above 20 miles from London, he must have eight days time to plead. *Buller* shewed cause, and insisted, that such rule of court extended only to persons residing in England, otherwise it might be contended that it extended to Italy as well as to Scotland. *Lord Mansfield.* No doubt but what it ought to be four days only; it should be deemed a residence in London, where arrested. Rule discharged. *Kutiff and another v. Gascoigne, Hil. 17 Geo. 3. 4 Term Rep. 553. in (n.)*

Imparlance when discretionary.

An imparlance seems discretionary in the judge on amendment, unless the plaintiff pays costs. So if the plaintiff keeps any deed, &c. which belongs to defendant, whereby he is to make his defence, and will not deliver it, for the law gives convenient time to make his best defence.

If the amendment be matter of form, it seems no im-
parlance; if in substance, costs must be paid, or impar-
lance. *N. on R. M.* 10 *Geo.* 2. As to amend-
ment.

*Within what Time Defendant is to plead, where there have
been no Proceedings for four Terms, in Law or Equity.*

If four terms are elapsed, after the declaration is deli-
vered, the defendant shall have a whole term's notice to
plead, before judgment can be entered against him, unless
the cause has been stayed by injunction or privilege. *N.*
on R. Tr. 5 & 6 *Geo.* 2. In this case you give notice to
the defendant, or his attorney, before the essoign-day of
the term, that you intend to proceed after the next term,
"by giving a rule to plead." The like rule to reply, re-
join, &c. How to pro-
ceed if four
terms are
elapsed.

Two days before *Hilary term*, plaintiff gave notice of
his intentions to proceed; on the 14th of *February*, two
days after *Hilary term*, the rule to plead was given, and
on the 18th of *April*, in the course of the same vacation,
the plaintiff signed judgment for want of a plea, which
was moved to be set aside for irregularity: and it was
contended, that defendant ought to have had the term
and vacation, as also until the four first days in *Easter*
term, to have pleaded, for that no rule to plead could be given
in the vacation; and if the vacation as well as the term
were not meant to be included by the rule, the judgment
had been signed too soon, for it appears to be signed of
Hilary term, so that there was not even a term's notice:
on the contrary, it was insisted, that according to the
practice of the court, the judgment was regular, for that
the rule did not extend beyond the term; and though the
judgment appeared to be signed of *Hilary term*, the de-
fendant had in fact the benefit of the rule for a whole
term. The court were of that opinion, adding, that the judg-
ment would appear to be regular on the record, though
signed as of *Hilary term*: for the rule requiring a term's
notice, where no proceedings have been had in the cause,
was only a rule of court introduced for the benefit of the
party, the full benefit of which, the defendant had had
in this instance. *Milbourn v. Nixon and others*, 2 *Term*
Rep. 40. Notice of in-
tention to
proceed de-
livered, two
days before
Hilary term.
Rule to plead,
13th Feb. and
judgment
signed for
want thereof
18th April,
held regular.

Give the rule the day after the last day of the term, and
demand plea; if no plea, sign judgment after the four
days are expired, exclusive. When to give
the rule and
sign judg-
ment.

Searching for Plea.

Special pleas are to be filed with the clerk of the papers. General pleas, or general issues, are delivered to the attorney, or entered in the general issue book kept by the clerk of the dockets; pay 6d. for the entry.

You are first to make search at the clerk of the papers in *Symond's Inn*, who keeps two books by the plaintiff's name; if you find no plea there, then search with the clerk of the dockets, at the King's Bench office; if there be no plea, sign judgment, the form of which see under title *Judgment by Default*.

If delay be made when entitled to sign judgment, defendant pleads after, it is good.

Although the plaintiff be entitled to judgment, yet if he delays signing it, the defendant may put in his plea, although the time be expired, by the rules of the court, and such plea will be accepted, for a judgment upon a *nil dicit* is for want of a plea; and if the plaintiff signs judgment after, the court will set it aside for irregularity. *Minns v. Baxter*, 1 Term Rep. 17. *Lill. Pract. Reg.* 373.

Solvit ad diem.

The plea of *solvit ad diem* should be delivered, and not entered in the general issue book. *Lockhart v. Mackreth*, 5 Term Rep. 661.

PLEAS IN ABATEMENT.

Must appear before plead- ed.

A PLEA in abatement cannot be pleaded before the defendant appears, because he does not answer to the process of the court, which formerly was returned and read at the bar. If he appeared, the countor read the writ to court in his presence, and he was to plead in four days unless special leave was given by the court; because the person coming in by the process of the court, ought not to have time to delay the plaintiff. *Gillb. C. P.* 52.

A declaration delivered 6th Nov. to plead in a town cause on the 7th; defendant gave notice to put in and justify bail on the 9th, and on that day filed a plea in abatement, but did not justify those bail, but put in other bail the 10th, and gave notice of justifying, and plaintiff excepted same day to such second bail, but they justified the 12th: and on the 19th plaintiff signed judgment for want of a plea, after demand made of one, and the court set the judgment aside. *Hopkinson v. Henry*, 13 East, 170.

If special bail be filed, a

If the defendant puts in special bail, though they be

not perfected in a country cause, he may the same day plea may be
 plead in abatement and perfect his bail afterwards. For filed before
 he is in court, unless it turn out on exception to the bail perfected.
 that they are set aside. *Dimsdale v. Neilson*, 2 East, 406.
 In a country cause such a plea could not be filed in time,
 if it was not so, for plaintiff may delay excepting to bail,
 for the purpose.

The practice seems now to be the same in town causes.
 11 East, 413. *Brains v. Morgan*.

And before such plea be pleaded, (which is to be filed,) Declaration to
 the declaration must be taken out of the office, or the be taken out
 plaintiff may sign judgment. *N. on R. T. 12 W. 3. M.* of office before
10 Geo. 2. Reg. 3. The plea ought to be filed, and not plea.
 delivered. 1 Term Rep. 278. *Harbord v. Perigal*.

Pleas to the jurisdiction of the court, or in abatement, Pleas to the
 ought to be pleaded before the rule for pleading is out, jurisdiction
 and cannot be pleaded after a common imparlance, or when to be
 unless the declaration be delivered after term, or so late pleaded.
 in the term, that the defendant is not bound to plead to it
 that term; in both which cases, the defendant may, with-
 in the first four days inclusive of the next term, plead
 any plea in abatement, or to the jurisdiction of the court
 (intituling it as of the preceding term,) 1 Term Rep. 278.
 5 T. R. 510. But if such plea be not filed in the office in
 time (whethera rule to plead be given or not,) such plea is
 not to be received. *N. on R. E. 5 Ann. Vide Comberb. 251.*

Pleas in abatement must be pleaded within four days, Within time
 if declaration be delivered before the last four days in to plead in
 term. *Long v. Miller*, 1 Wils. 23. abatement.

The defendant having given a bail-bond to the sheriff
 on his arrest, and been served with notice of declaration;
 if he do not plead in abatement within the four first days
 the court will not afterwards (though before pleading in
 chief,) set aside the proceedings upon motion, on the
 ground that he had been arrested and declared against
 by a wrong christian name. *Binfield v. Maxwell*, 15
East, 159.

A plea in abatement is bad after a general imparlance. Bad after
Evans q. t. v. Stevens, 4 Term Rep. 224. and may be general impar-
 taken advantage of on a general demurrer, 6 Term Rep. lance.
 369. *Duddle v. Wilson*. (a) And it also may be taken

(a) The plea in abatement should always be pleaded
 the term the declaration is of, although the defendant is
 entitled to an imparlance. I know of no imparlance roll
 in this court.

advantage of on special demurrer, though not assigned as a cause. *Lloyd v. Williams and another*, 2 *Maule and Selw.* 484.

Sunday when accounted as one of the days.

Sunday is to be accounted as one of the four days, unless it happens to be the last day, *Ibid.* In that case the plea may be filed on the *Monday*; otherwise as no plea can be filed on the *Sunday*, the time would be limited to three days in such cases. *Lee v. Carlton*, 3 *Term Rep.* 642. *Per Buller, J.*

By attorney.

And a plea in abatement may be pleaded by attorney. 1 *Ld. Ray.* 509. but not to the jurisdiction. *Gibb. C. P.* 187.

Four days to plead in abatement, are both inclusive.

Declaration was delivered the 16th *May*, and the 20th the plea in abatement was filed. Plaintiff signed his judgment, alleging it ought to have been filed the 19th. *Court*: All pleas to the jurisdiction and in abatement, being dilatory, ought not to be favored: and that the four days allowed for pleading them are both to be reckoned inclusive. Rule, why the judgment should not be set aside, discharged. But the defendant had leave to plead the general issue on the payment of costs. *Jennings v. Webb*, 1 *Term Rep.* 277.

Leave to plead the general issue.

What shall be a special imparlance in pleading misnomer in abatement.

The defendant pleaded a misnomer in abatement, which was after an imparlance, thus: at which day came *Ham John Crapper* (the defendant's true name,) who is sued by the name of *John Capper, &c.* to which the plaintiff demurred; and objected, that this plea in abatement ought to have been pleaded of the same term with the declaration, or after a special imparlance, and that this is after a general imparlance. But *per Curiam*, this imparlance, by the true name, is special for this purpose; but if he had said *venit prædict. John Capper*, it had been bad, for that would have confessed that *John Capper* was the true name. *Kelw.* 93, b. Judgment for defendant.—*Brewster v. Capper*, 1 *Wils.* 261.

If plea in abatement be irregular, judgment may be signed.

The declaration was delivered as of *Trinity-term*, before the essoign-day of *Michaelmas*, with the usual notice to plead within the first four days of the latter term, within which time the defendant filed this plea: "And *Lescelles Lascelles*, who is sued by the name of "*Sturdy Lascelles*, in his proper person comes and pleads that he was baptized by the name of *Lescelles, &c.* "without this, that he ever was called or known by the "name of *Sturdy, &c.*" The plaintiff considering this plea as delivered out of time, signed judgment. Motion to set it aside. *Brewster v. Capper* was cited. *Sed per*

cur. Such a plea as this can only be received after a special imparlance, which should be stated on the record; but that not appearing here, the plaintiff was entitled to sign judgment. Rule discharged. *Doughty v. Lascelles*, 4 Term Rep. 520. See *Blackmore v. Fleming*, S. P. 7 Term Rep. 447. in (n); where the court held that such a plea cannot be pleaded in a subsequent term without entering a special imparlance.

Writ returnable 6th February, 1787, declaration filed the 7th, and a rule to plead given same day: but notice was not delivered till the 8th, and the plea filed the 15th in abatement; plaintiff signed judgment the 16th. Rule to set it aside for irregularity. It was contended, that the rule to plead being given before notice of declaration served, was irregular; but the court said, the party may undoubtedly dispense with the rule to plead. And here the defendant has superseded the necessity of a rule to plead, by pleading in abatement. Rule discharged. *Brandon v. Payne*, 1 Term Rep. 690.

If the defendant plead in abatement, he dispenses with the rule.

Declaration filed Wednesday the 17th Feb. 1793.—The 21st was on Sunday, and on 22d defendant filed a plea in abatement; plaintiff signed judgment, which the court held regular: the four days are reckoned inclusively, the time expired on the Saturday. *Harbord v. Perigal*, 5 Term Rep. 210.

The four days are inclusive.

In a special action on the case, upon the custom against a carrier, for the delivering goods, after a general imparlance to Easter term; the defendant pleaded in abatement, that several others were his partners, and that the goods were delivered and received by him and his partners jointly, and not by him solely, and that they were living—to which there was a general demurrer:—court held, that the plea was bad, because pleaded after a general imparlance, but that it might have been supported if it had been pleaded in proper time. 6 Term Rep. 369. *Buddle v. Wilson*.

After a general imparlance, a plea in abatement is bad, and may be demurred to.

In every plea to the jurisdiction, another jurisdiction must be stated. *Mostyn v. Fabrigas*, Cowp. Rep. 172. They must be pleaded in person. *Gilb. C. P.* 187.

As to jurisdiction.

Ancient demesne must be pleaded in ejectment within the first four days of the term. *Denn on dem. Root v. Fenn*, 8 Term Rep. 474. *Barnes*, 185. S. P. *Doe v. Thomas*.

Ancient demesne.

Plea of ancient demesne was permitted to be filed, *de bene esse* within the first four days pending a rule nisi for

permission to allow the plea so filed. *Doe dem. Morton v. Roe*, 10 *East*. 523.

Rules laid down for pleading in abatement.

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them; 1st, by 4 & 5 *Ann. c. 16*, "No dilatory plea shall be received, unless the party by affidavit prove the truth thereof, or shew some probable matter to induce the court to believe that it is true." 2d, That no plea in abatement shall be received after a *respondeas ouster*, for then they would be in infinitum. 2 *Saund.* 41. 3d, That they are to be pleaded before imparlance, except where the declaration is delivered too late. 4th, That where the judgment prayed goes to the writ, there it is *ut respondeas ouster*: but where it goes to the *action*, it is *quod recuperet*. *Gillb. C. P.* 53. And therefore the jury ought to assess the damages, because the defendant chusing to put the whole weight of his cause upon this issue, where he might have had a plea in chief, is an admittance that he had no other defence. 10 *Mod.* 112. An affidavit is necessary wherever you plead to the jurisdiction. 2 *Lord Raym.* 1418.

If a demurrer to plead judgment is a *respondeas ouster*.

If there be a demurrer to a plea in abatement, there shall be a *respondeas ouster*, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court. *Bowen, one, &c. v. Shapcott*, 1 *East*. 542. See 2 *Wilson*, 367. S. P. In this case it is in the discretion of the court to give the defendant time to plead. *Comb.* 19.

After *respondeas ouster*, may plead in abatement to the person of plaintiff.

After a judgment of *respondeas ouster*, it is said, there can be no plea in abatement. *Gillb. C. P.* 186. But this must be understood of pleas in abatement in the same degree, as popish recusancy and outlawry, being both to the person; for the defendant may plead to the person of the plaintiff, and if that be over-ruled, he may afterwards plead to the form of the writ. *Com. Dig.* 66. title *Abatement*.

Costs.

On an issue in fact, the defendant is entitled to costs, but not on an issue in law. 2 *Ld. Ray.* 992. 1 *Salk.* 194. S. C.

No advantage can be taken of declaration.

On a plea in abatement no advantage can be taken of the errors in the declaration; for nothing but the writ is then in question, and nothing else is pleaded to. *Carth.* 172. 3 *Lev.* 361.

Cannot plead in abatement if proceedings

If a defendant has forfeited his bail-bond, and proceedings be stayed at his request, he cannot afterwards plead

in abatement to the original action; but must plead in chief. *Salk.* 519. be stayed on bond.

And the court will refuse to order a bail-bond to be cancelled on an affidavit of defendant, that he was not the person; but will leave him to plead in abatement. As where the action was, *Salter qui tam v. Sherfold*, defendant entered into the bail-bond by the name of *Williams*, which was in his right name, then moved to have the bond cancelled as above, which was denied. 3 *Term Rep.* 572. Court will not order bond to be cancelled if defendant be taken by wrong name.

On a *respondeas ouster*, no notice need be given of it, for the defendant is supposed to be attending his cause to maintain his plea. *Salk.* 7. Respondeas ouster.

The plea must give his surname, as well as his true christian name, although his true surname be named in the declaration. *Hayworth v. Spraggs*, 8 *Term Rep.* 515. Surname as well as christian name.

If the defendant omits to plead a misnomer in his right name, he may be taken in execution by his wrong name. *Str.* 1218. *Crawford v. Satchell. Sed qu.* 8 *East.* 328. *Shadget v. Clipson.* Wrong name.

A defendant cannot plead two dilatory pleas.

The court will not suffer a plea in abatement to be amended. Cannot plead two dilatory pleas.

A plea in abatement must be signed in court, and filed with the clerk of the papers; and without an affidavit annexed to it, judgment may be signed. Cannot amend plea in abatement.

If the defendant plead in abatement of his surname, or christian name, the plaintiff may have a summons to amend his declaration, upon payment of costs, which saves the entry of a *cassetur billa*; but if the plaintiff thinks proper to enter a *cassetur billa*, then it is to be done thus: get a roll, enter a memorandum of the term the declaration is delivered, and the plea at the foot thereof; (then say) and thereupon the said T. W. says, that he cannot deny the said exception of the said J. R. above by his plea taken to his said bill, but admits the same to be true; therefore it is considered by the court of our said lord the king, before the king himself here, that the said bill of the said T. W. be quashed, &c. A plea in abatement must be signed.
May amend declaration.
How to enter a cassetur billa.
Judgment of cassetur billa.

The roll is to be taken to the clerk of the judgments and docketed, pay 4d. per sheet, and the master marks the *cassetur billa thereon*, when the entries are paid for; it is filed with the clerk of the treasury; then proceed anew.

If plea be correct, court must receive it, but if inaccurate, cannot be supported.

The court cannot hold too strict a hand over this sort of pleadings, which are calculated to defeat the justice of the case; if the plea be drawn correctly, the court cannot deprive the defendant of the benefit of it. But if there be the least inaccuracy in it, it cannot be supported. *Roberts v. Moon*, 5 Term Rep. 488. If the defendant pleads, and the said *Richard* sued by the name of *Robert*, it is bad.

OYER.

So to the plaintiff.

If the plaintiff sets forth in his declaration a *profert in curia* of a deed, writing, letters of administration or the like, the defendant may pray oyer, and must have a copy delivered him that he may consider what he is to plead. So likewise, if the defendant in his plea makes a *profert in curia* of any deed, &c. the plaintiff may make the like demand of oyer, and have a copy delivered to him, paying for the same after the rate of four-pence per sheet. 2 Sulk. 497. 5 & 6 Geo. 2. (b) K. B.

The party is bound to carry it.

As oyer of deeds is demandable by either party, the party of whom the oyer is demanded, is bound to carry it to the adverse party. 2 Term Rep. 40. *Page v. Divine and others*.

Letters of administration.

So if plaintiff sets forth letters of administration, the defendant may pray oyer. 2 Wils. 413.

Record.

But oyer of a record is never granted. 1 Term Rep. 149. *Rex v. Amery*.

Cannot now demand oyer of original writ.

The defendant was formerly allowed oyer of the original writ, in order to demur or plead in abatement for any apparent insufficiency, or variance. But this indulgence having been abused, and made an instrument of delay, a rule was made, that the defendant be not allowed oyer of an original writ, and that if he demanded it the plaintiff may proceed as if no demand had been made. R. T. 19 Geo. 3. *Doughl.* 227. 6 T. R. 363.

When *profert* may be dispensed with.

There are cases in which the *profert* may be dispensed with, *vide* 3 Term Rep. 151.; and if a *profert* is made by mistake, the court will give leave to amend, and let the party in to plead according to the fact. *Ibid.* 153. *contra.* 2 Str. 1126. 1 Wils. 26.

When to be demanded of Plaintiff.

The demand of oyer is a kind of plea, and should regularly be made before the time for pleading is expired. *When to be demanded.*
Rex v. Amery, 2 Term Rep. 150. 2 Bos. and P. 379. In this court, oyer may now be made after an imparlance. 12 Mod. 99. *Ld. Ray.* 970. 2 Lev. 142.; and I think after a judge's order obtained, previous to the expiration.

The party demanding oyer shall pay for a copy at the rate of 4d. per sheet; and if the defendant craves oyer of any thing whereof he is entitled to oyer, and it is not delivered in time, he shall have so many days after the rule is out, as when he demanded oyer before the rule is out. *Powell v. Gay*, Str. 705. So the plaintiff shall have the same time to reply as he had at the time of demanding oyer. N. on R. T. 5 & 6 Geo. 2. *Party demanding oyer must pay for a copy in term time.*

The declaration was delivered in last *Easter* term, to plead within the four first days of *Trinity* term. The defendant demanded oyer of the bond on the third day in *Easter* vacation, which was given the day before the *essoign* of *Trin.* term. On the 5th day of *Trin.* term plaintiff signed judgment for want of plea; to set aside which, a motion was made. The court were of opinion the judgment was regular, that the general expression used in the books that the party has the same time to plead after oyer granted, as he had when it was demanded, must be understood to mean as much time in term time, as many pleading days, otherwise if oyer were demanded on the last day of *Trinity* term, and given the day before *Mich.* term, the defendant would not be obliged to plead, until the *Easter* term following. *Webber v. Austin*, 8 Term Rep. 356. *If oyer be demanded in vacation, and given before the essoign of the next term.*

Anciently oyer was demanded in court, but now it is made by one attorney, of the other. 6 Mod. 28. (a) *Formerly demanded in court.*

Upon oyer, the party is entitled to a copy of the whole deed, witnesses' names, and all memorandums subscribed and indorsed upon it. *Vide Barn.* 263. So of the bond, and condition. *Copy of the whole deed, &c.*

There is no settled time for the plaintiff to give oyer, because it is in his own delay. But the defendant shall *No time fixed for plaintiff to give oyer.*

(a) 12 Mod. 598. 3 Salk. 119. 2 Lutw. 1644. contra.

in all cases have the same time to plead, or as many pleading days after oyer given as he had at the time of demanding of it. 8 *T. R.* 356. And the defendant may either set forth the oyer in his plea or not, at his election. 2 *Str.* 1241. *Weavers' Co. v. Forest.* *Ld. Ray.* 969. *Carth.* 301. 1 *Wils.* 97.

Within what time defendant must give oyer.

The time allowed for the defendant to give oyer to the plaintiff, is *two* days, exclusive after it is demanded. 2 *T. R.* 40. And if it be not given in that time the plaintiff may sign judgment, as for want of a plea. 6 *Mod.* 122.

As to the plaintiff's time to reply after oyer given.

If given, the plaintiff shall have the same time to reply after oyer given him by the defendant, as he had at the time of demanding it. *R. T.* 5 & 6 *Geo.* 3. (b) *K. B.*

Sunday last day.

Sunday in this case was the last day ; therefore he had the whole of *Monday* to deliver oyer.

Or deed in hands of third person.

Where the bond or deed is in the hands of a third person, the court on motion will oblige him to give oyer and produce it. *Str.* 1198. *Sid.* 50. So if it be in the hands of the defendant, when he can have no pretence to it. 3 *Term Rep.* 153. in notes. *Matison v. Atkinson.* If the deed be lost. See 2 *Str.* 1186. 1 *Wils.* 16.

A. B.

In the King's Bench.

v.

C. D.

Demand of oyer by the defendants.

The defendant demands oyer and copy of the indenture of lease, or articles of agreement, &c. in the declaration mentioned. Or (if the action be upon bond, say, of the writing obligatory and the condition thereof mentioned in the declaration in this cause). Yours, &c.
G. H. defendant's attorney.

To Mr. E. F. plaintiff's attorney or agent.

A. B.

In the King's Bench.

v.

C. D.

Demand of oyer by the plaintiff.

The plaintiff demands oyer, and copy of the indenture of lease, &c. mentioned in the plea in this cause. Yours, &c.

J. K.,

To Mr. G. H. defendant's attorney (or agent.)

Judgment cannot be signed for nonpayment.

The oyer need not be ingrossed on stamped paper. The master says judgment cannot be signed for want of payment of copy.

It is said, if oyer be not made in due time, i. e. after the time for pleading expired, the plaintiff may consider the demand as a nullity, and sign judgment. *Tidd*. 6 Ed. 616. cites *Fowler v. Dyer*, *M.* 20 Geo. 3. This is in case time is not obtained. If oyer is demanded after the time expired. Barn. 326.

If a judgment or other matter of record in the same court be pleaded, the party pleading it, must, on demand, give a note in writing of the term and number roll, wherein such judgment or other matter of record is entered and filed, or in default thereof, the plea is not to be received. *N. on R. T.* 5 & 6 Geo. 2. *Carth.* 454. 1 *Ld. Raym.* 347. 550. 2 *Str.* 823. which states, that court made a rule to reject the plea, unless the term and number roll is given. *Hunter v. Wiseman*. But if he plead a judgment recovered in a different court, the plaintiff must reply nul tiel record. If a judgment or other matter of record in same court be pleaded. If of another court.

If defendant demands oyer of an obligation, he shall not have oyer of the condition, unless he demands that also. 6 *Mod. Cas.* 237. If oyer of bond only.

But if he demands oyer of an indenture, which refers to matter indorsed, it is not a complete oyer, if he has not oyer of the indorsement also. *Ibid.* If of an indenture.

The defendant in an action of debt on bond, after craving oyer of the bond and condition, set out in her plea the condition, omitting the reciting part preceding it. Motion to quash the plea:—*Court*. By craving oyer, the defendant undertook to set out in her plea the whole condition, including the recital in so many words: and that not having done so, the plea was bad. That the plaintiff would have been warranted in signing judgment, as for want of a plea; and that though in this case, no time was gained by the defendant's attempt, yet in most cases a false recital was made for the purpose of delay; and made rule absolute; refused also to let the defendant amend. *Wallace v. the duchess of Cumberland*, 4 *Term Rep.* 370. No trial had been lost. If the whole of the condition of bond, with recitals, be not set out after oyer, plaintiff may sign judgment, or court will quash plea.

To debt on bond, after oyer, defendant set it out in plea truly, pleaded payment by the principal, he being a surety: plaintiff replied, and put the pleas in issue, and then served defendant's attorney with a rule to abide by his pleas, and gave notice of trial: the defendant returned the paper book, setting out a false oyer of the bond and pleadings as before, on which the plaintiffs inrolled the true condition, and demurred. On the day of argument, which was the last paper day of the term, the defendant's counsel objected to its being argued, because it If bond after oyer be set out truly, and book made up, and rule to abide by the plea be given, and defendant plead anew with a false condition, court will or-

der plaintiff to sign judgment and attach the attorney. was the last paper day. The court, on hearing the above fact stated, directed an affidavit of them to be made, and made a rule *nisi* for striking out all the pleadings of defendant, that the plaintiff should have judgment, and that the defendant's attorney should pay all the costs, and were inclined to grant an attachment against him. *Ferguson v. Macreth*, *Hil. 24 Geo. 3. 4 Term Rep. 371. n. b.*

COPIES.

If declaration be on a policy, exchange, or note, may have a summons to take a copy or inspect same. If the action be founded on a written instrument *not under seal*, oyer cannot be demanded. But if the declaration be on a policy of assurance, bill of exchange, or promissory note, special agreement or undertaking in writing, the judge will on a summons order a copy to be given to the defendant's attorney; in which summons may be put, and that all proceedings in the mean time be staid, or the defendant's attorney may have a summons to be at liberty to inspect the same. With respect to actions on policies of assurance, see the stat. 19 *Geo. 2. c. 37. s. 6.* as to the giving sums assured and borrowed at respondentia or bottomree, for the voyage.

The general rule.

The rule laid down by Lord *Manfield* upon this subject, was, that whenever the defendant would be entitled to discovery, he should have it here without going into equity. *Barry v. Alexander*, *M. 25 Geo. 3. K. B.*

Plaintiff may have rule *nisi* to produce a deed.

In this court the plaintiff may have a rule *nisi* for the defendant to produce a deed before the commissioners of the stamp office, to be stamped, and also to give the plaintiff a copy of it, that he may declare thereon. *Cooke v. Stocks*, *M. 36 Geo. 3. K. B.*

PLEADING IN BAR.

General issue how pleaded.

It has been already stated, that pleas in bar are of two sorts, *general* and *special*; the *general issue*, is either to be ingrossed in form on a four-penny stamp paper, and delivered over to the plaintiff's attorney within the time allowed by the rules of *T. 1 Geo. 2. and 22 Geo. 3. (a)* or it is to be entered in the general issue book, with the clerk of the judgments, who takes 6d.

The several general issues.

The general issues are as follow—In an action of *assumpsit, non assumpsit*; in debt, on simple contract, *nil debet*; in debt, on specialty, *non est factum*; in debt, on

(a) See the rules ante, 231, 232.

record, *nul tiel record*; in detinue, *non detinet*; and in trespass, *vi et armis*, and trespass on the case for wrongs done, not guilty. And where the general issue may, it ought in general to be pleaded, it being cause of demurrer, that the plea amounts to the general issue; and where the defence consists of matter of law, the defendant may either plead it *specially*, or give it in evidence under the general issue; as in *assumpsit*, *infancy* may be either pleaded or given in evidence on *non assumpsit*; and in debt on bond, the defendant may either plead coverture, or give it in evidence on *non est factum*.

In *qui tam* actions, and actions on penal statutes, the plea is not guilty; but a former recovery must be pleaded. Qui tam actions.

Upon the general issue in *assumpsit*, the question is, whether there was a subsisting debt, or cause of action at the time of commencing the suit. But matter of law in avoidance of the contract, or discharge of the action are usually pleaded. On general issue in *assumpsit*, what is the question.

No general issue needs a counsel's hand, nor need the following pleas: bankruptcy, 6 Term Rep. 196. *compensuit ad diem* to a bail-bond, *son assault demesne*, *plene administravit* by an executor or administrator, *riens per discent nul tiel record* to an action on a judgment or recognizance, *per minas*, *solvit ad diem*, 5 Term Rep. 661, *ne unques executor*, *infra ætatem*, Cook's case, 41. to which may be added a special *non est factum* in covenant, when the plea concludes to the country, and *liberum tenementum* in trespass, or not guilty to a new assignment. All pleas and demurrers upon writs of error, *scire facias*, and *audita querela*, ought also to be delivered, R. 12 W. 3. (a) to be delivered to plaintiff's attorney, ingrossed on a 4d. stamp paper; nor must these pleas be entered in the general issue book. See title *Issue*, as to making up issue on these pleas.

What pleas need no counsel's hand.

Before plea can be pleaded, bail must be perfected; for though it is filed previous to the perfecting bail, it does not make it a good plea, for the defendant is not in court till the bail are perfected, and if such plea is filed or delivered before the bail are perfected, the plaintiff may If plea be filed before bail perfected, it is a nullity, except a plea in abatement.

(a) The general issue, and *plene administravit* must be filed. *Harrison v. Franco*, 2 East 225, being a double plea. All double pleas must be filed, *ib.*

sign judgment. *Venn v. Calvert*, 4 Term Rep. 578. Vide *Cooke v. Raven*, 1 Term Rep. 635. except a plea in abatement pleaded in a country cause.

Declaration must be taken out of office before bill filed, &c.

Also before plea filed or delivered, the declaration must be taken out of the office, or plaintiff may sign a judgment.

Pleading specially.

To be signed by counsel.

All special pleas must be signed by counsel or a serjeant, (except those before mentioned, ante 287.) and if such special plea be single, ingross same on a four-penny stamp paper, put counsel's name at the foot, and file it with the clerk of the papers.

Clerk of the papers to receive no special pleas or demurrers before signed.

It is ordered, that no special pleas or demurrers in law shall be received by the clerk of the papers, before such pleas or demurrers in law shall be signed with the proper hand of some counsel in that behalf retained. *R. T. 18 Car. 2.*

No attorney to deliver any plea that ought to be filed.

Ordered, that no attorney or clerk presume to deliver to any other attorney or clerk, or to any other person, or to receive from any attorney or clerk, or any other person, any special plea to be put into the office of the clerk of the papers, or a copy of such plea, before that such plea shall be put into the office of the clerk of the papers; and that such copy after such plea be put in shall be made by the clerk attending in the office of clerk of the papers, and signed under the hand of one of the clerks attending there. *R. T. 2 W. and M.*

Where a special plea was not filed, and plaintiff replied, he made up issue, and paid clerk of the papers, held good.

Non assumpsit and statute of limitations pleaded, which was delivered, plaintiff replied and made up the issue, defendant's attorney paid for it; the plaintiff's attorney finding the book ought to have been made up by the clerk of the papers, paid him his fees, and proceeded to trial; no defence was made, and court held that defendant was in first fault in not leaving the pleas in the office. *Thomson v. Tiller*, 2 Str. 1166.

Writ against two, both served, one does not appear, &c.

If the writ be against two, and both served before the return, one does not appear in the same term: yet the court will make him plead as of the term when he ought to have appeared. *Smith v. Muller*, 3 Term Rep. 627.

Of pleading double.

Any defendant in any action, or any plaintiff in replevin, in any court of record, with leave of the same court, may plead as many several matters as he shall think necessary for his defence, provided that if any such matter shall, on demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause, for plaintiff, costs shall be also given, in like manner; unless the judge who tried the said issue, shall certify, that the said defendant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him. Provided that nothing shall extend to any writ, declaration, or appeal of felony, &c. or to any writ, bill, action, or information upon any penal statute. *Stat. 4 Ann. c. 16. s. 4, 5.*

May plead as many pleas as are necessary.

After the plea is drawn and signed by counsel, give him a brief to move to plead the several matters specified, which he is to specify on the motion paper, or on the back of the draft of the plea, which he signs of course; fee 10s. 6d. If you are in time take the plea and brief to the clerk of the rules, who will draw up rule, pay 1s. 4d. per sheet, annex the copy to the plea, which is to be ingrossed on a 4d. stamp paper, then file same with the clerk of the papers. But sometimes it so happens, that there is *not* time sufficient to get the rule drawn up; in that case, leave the plea and brief at the clerk of the rules, who will draw it up, copy same, and serve it on plaintiff's attorney immediately.

How to proceed after plea is drawn and signed.

A. B. } It is ordered that the defendant have leave to
v. } plead several matters, to wit, the general issue
C. D. } *non assumpsit*, the statute of limitations, and a
set-off (describing the pleas) upon the motion of Mr.

Rule to plead several matters in K. B.

By the Court.

But if such plea and brief be not left before plea filed, plaintiff may sign judgment, for want of a plea.

If rule neglected.

This court never refuse leave to plead several matters, provided the pleas be not inconsistent, and liable to make an incongruity on the record, as *non est factum*, and a tender to part. *Jenkins v. Edwards*, 5 Term Rep. 98. or *non assumpsit* to the whole, and tender to part. *Maclellan v. Howard*, 4 Term Rep. 194. Because, if the general issue

If pleas be inconsistent, may not be pleaded.

be found for the defendant, it will then appear on the record that no debt is due, and yet that the defendant admits something to be due. (a)

In penal actions one plea.

The stat. 4 *Ann. c.* 19. does not extend to actions on penal statutes; therefore to a penal action the defendant pleaded, 1. the general issue; and 2. a prosecution, and acquittal for same offence before a justice; the court granted a rule for defendant to elect on which of the pleas he meant to rely, and to set aside the other plea. *Heyrick v. Foster*, 4 *Term Rep.* 701. *Str.* 1044. 2 *Wils.* 21. *Barn.* 36.

Certificate of probable cause by judge of plea need not be made in court.

The certificate of probable cause for the special plea is not required to be made in court at the trial of the cause; and where the judge refuses to grant it, the court have not a discretionary power whether they will allow the defendant any costs at all; but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion. 2 *Term Rep.* 237, 394.

If pleaded in Vacation.

A summons must be obtained.

A summons must be obtained to plead several matters, serve copy on plaintiff's attorney, and the judge, on stating the pleas, will make an order for the clerk of the rules to be at liberty to draw up a rule on producing counsel's hand to the motion paper, which obtain, and then take the plea and motion paper with the order, to the clerk of the rules, who will draw up the rule, serve copy on the plaintiff's attorney.

The plea of *solvit ad diem* cannot be entered in the general issue book, and plaintiff may sign judgment as for want of a plea.

The defendant entered in the general issue book, "the defendant pleads the general issue of *solvit ad diem*," plaintiff signed judgment, and issued execution. Motion to set aside the judgment, and the *fi. fa.* executed. *Court.* The judgment is regular, the plea concluding with a verification, could not be entered in the general issue book. *Lockart v. Macreth*, 5 *Term Rep.* 661. Rule discharged.

(a) A plea of alien enemy not allowed to be pleaded with a special justification inconsistent therewith in an action of trespass and false imprisonment. 12 *East*, 206. *Truckenbrodt v. Payne.*

This plea requires a special replication, therefore could not be entered in the general issue book.

AMENDMENT.

Of amending Declarations and other Pleadings.

FORMERLY the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings and other mistakes of clerks, all which might be amended at the common law, whilst all the proceedings were in paper. 1 *Burr.* 322. For they were then considered only *in fieri*, and therefore subject only to the controul of the courts; but when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for during the term the record is in the breast of the court; but afterwards it admitted of no alteration. *Co. Lit.* 260. Now the courts are more liberal, and, where justice requires it, will allow of amendments at any time whilst the suit is depending, notwithstanding the record be made up and the term past; and the court will always take care that if one party obtains leave to amend, the other will not be prejudiced nor delayed thereby. 2 *Burr.* 756. *Alder v. Chip.*

The statutes are 14 *Ed.* 3. c. 6. 8 *H.* 6. c. 12. & c. 15. the purport of which is, that the judges may amend in any record or process, word, plea, warrant of attorney, writ, panel, or return, all that which seems to them to be the misprision of the clerk (except appeals, &c. and outlawries of the same). Misprisions of clerks.

All the other statutes, which are more extensive in their nature, are held to be statutes of *jeofail*. Jeofails.

The statutes of amendment only extend to pleadings of record; so that when the proceedings are plainly upon record, and are known to be so by the court, no amendment therein can be made (except *such* as are warranted by the statute of amendments.) The stat. of amendment only to extend to pleadings of record.

Leave was granted to amend a special *capias*, in order that an application might be made to the master of the rolls to procure a new original. 7 *Term Rep.* 299. *Carr v. Shaw.* Capias.

In order to amend upon these statutes, it is a general There must
U 2

be something to amend by. rule, that there must be something to amend by, as the declaration by the bill, 2 *Str.* 954. the pleadings subsequent, by the paper book, 2 *Ld. Ray.* 895. or draft under counsel's hand, 2 *Str.* 846. the verdict by the plea roll, 1 *Ld. Ray.* 133. the judgment by the verdict, 3 *Term Rep.* 349. the execution by the judgment, *Say. Rep.* 12. 2 *T. Rep.* 737. 3 *Term Rep.* 657. the postea by the judge's notes. 3 *ib.* 749.

Process. In general, *process* may be amended, where there is anything to amend by (as the præcipe.) 1 *Term Rep.* 782. Also the teste of a judicial writ is amendable. *Yelv.* 64.

If defendant be served by wrong name. Defendant served with a copy of a latitat in a penal action by a wrong name, and declaration filed conditionally by the same name, to which defendant appeared and pleaded a misnomer. Held, that a judge's order to amend the bill and declaration by substituting the true name was good, and after such amendment there was no irregularity. *Mestaer and another qui tam v. Hertz,* 3 *Maule and Selw.* 450.

But this court will not grant a rule for amending the writ under which defendant had been arrested by a wrong name after an action of false imprisonment had been brought for such arrest. *Anon. M.* 41 *Geo. 3. cited Tidd,* 6 *Ed.* 162.

Sci. fa. In the case of *Braswell and Jeco*, 9 *East*, 316. the court ordered two writs of *sci. fa.* issued upon a judgment and declaration thereon to be amended conformable to the judgment roll.

May amend without imparlance. By rule, *Mich.* 1654. s. 13. the plaintiff may amend his declaration, paying costs, or giving an imparlance at the plaintiff's election, by the order of court, or of a judge, after it is entered, if the amendment be but a small matter, that it doth not deface the roll.

If appearance be entered by wrong name. If the defendant be rightly named both in the writ and declaration, and in the affidavit of service of the writ, but not in the appearance entered by the plaintiff according to the stat. this may on application to the court be amended. 3 *Wils.* 49.

By intituling it the day. It may be amended by intituling it of the day on which it was actually delivered, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. 1 *East.* 133. *Coutanche v. Le Ruer.*

In matters of form, after plea without costs. A declaration may be amended in matter of form, after a general issue pleaded, and before entry, without pay-

ing costs or giving an imparlance; but if amended in substance, the plaintiff must pay costs, or give an imparlance; not. and if the amendment be in substance, after a special plea pleaded, the plaintiff must pay costs, though he had rather give an imparlance. And in all cases of amendment after plea pleaded, the defendant has liberty to plead again, and has two days for that purpose after the amendment made and payment of costs. N. on R. M. 10 *Geo.* 2. 2 *Str.* 950. If a rule to plead be entered the same term the amendment is made (though before such amendment,) it is sufficient, otherwise a new rule to plead must be entered. For there must be a rule to plead entered of the term to warrant the judgment. 1 *Salk.* 517, 520. *Ibid.*

In substance
Two days to
plead.

No new rule
necessary.

The plaintiff, after plea pleaded, or after the end of the second term, shall not add a new count to his declaration, under pretence of amending. 1 *Wils.* 149. *Aubeer v. Barker.*—The reason is, that the plaintiff is obliged to declare within two terms: and a new count, or right of action is considered as a new declaration. 1 *Wils.* 223. *Waters v. Bovell.*

Shall not add
a new count.

But he was allowed to amend even against a prisoner, by striking out the words *alias Herbert*, after plea in abatement, after the end of the second term. *Owens v. Dubois*, 7 *Term Rep.* 698.

If plaintiff amend his declaration, the defendant shall have two days, exclusive of the day of amendment, to alter his first plea or plead any other. N. on R. T. 5 & 6 *Geo.* 2.

Two days af-
ter amend-
ment to plead.

Application was made to amend by adding two counts the term next after the term in which declaration was delivered, and after defendant had pleaded, refused. *Aubeer v. Barker*, 1 *Wils.* 149.

No amend-
ment after
two terms by
adding a new
count.

Leave was given to file a new bill to amend by, *Str.* 583. *Russell v. Martin.* After verdict, court ordered an amendment of the declaration, by the bill. *Str.* 1151. *Wilder v. Handy*, 1162.

May file a
new bill to
amend by.
After verdict.

So according to the bill filed, by increasing the damages, even after verdict, setting it aside, and granting a new trial. 7 *Term Rep.* 132. *Thomlinson v. Blacksmith.*

Increase of
damages.

The court will not put off trial upon motion at *nisi prius*, in order to amend his declaration by omitting the profert of the bond on which the action is brought. *Paine v. Bustin*, 1 *Stark. N. P. Rep.* 74.

The court
at nisi prius
will not
allow party to
amend.

Nor will it allow the alteration to be made by way of amendment at *nisi prius*, for it is a matter of material allegation. *Ibid.*

May amend
although re-
cord be pass-
ed.

If the record is made up and passed, and either party want to amend the pleading, it will be ordered on payment of costs: for the record may be engrossed anew, and the costs make amends, although notice of trial be given, even in a country cause. Mr. *J. Buller* made such an order, the assizes being very near indeed, and record made up and passed, that the defendant might amend his plea on payment of the costs. But I should think where it would require a new replication, it would be otherwise, or a delay to go to trial.

After demur-
rer, amend-
ment.

Defendant demurred to the declaration, summons to amend. Master was of opinion plaintiff had *two days* time to plead from the date of the order.

Replication
amended.

Replication was amended after verdict, by inserting the words "and the defendant does so likewise;" at the end of the replication, instead of, &c. *Cowp. Rep. Sayer v. Pocock*, 407.

Amendment of
replication.

The plaintiff had leave to amend his replication, where issue had been joined upon it, and the cause entered at the assizes, and made remanet for defect of jurors. *Say. Rep.* 285. So he may withdraw his replication and reply *de novo* after a lapse of six years. *2 Burr.* 756. *Alder v. Chip.*

After verdict.

But after verdict the court will not let plaintiff alter his replication and reply fraud. *2 Str.* 1002. So

After nonsuit.

if plaintiff be nonsuited, the court will not give him leave to reply *de novo*. *5 Burr.* 2692.

If replication
is bad to a
sham plea.

If there be a bad replication to a sham plea, court will give leave to amend without costs, unless defendant makes an affidavit of the truth of his plea. *Solomons v. Lyon*, 1 *East*, 369.

Bill on file
may be
amended.

A bill on the file may be amended at any time before plea pleaded, *during the term* of which it is; but not afterwards, without leave of the court, *N. on R. M.* 10 *Geo. 2. Reg. 2.* In the *Duchess of Marlborough v. Widmore*, the amendment was allowed on a particular reason; for if it had not been there allowed, the action would have been lost by the running of the statute of limitations. 1 *Wils.* 149. *Str.* 890. *Ex. of D. Marl. v. Widmore.* It was altered by laying the promise made to the executors instead of the testator.

There is no instance in which the court had given leave to amend as to the parties to the suit in a *qui tam action* after a demurrer. *Buller, J. Evans qui tam v. Stevens*, 4 Term Rep. 228. Qui tam actions.

Where an action for usury had been depending four years, court could not allow amendments to be made in the declaration, though the pleadings were still in paper. *Goff v. Popplewell*, 2 Term Rep. 707. Usury.

In a penal action, under the statute of usury, the court refused to amend declaration; the writ issued 9th Dec. 1792, declaration E. T. 1794. In Trinity term 1794, issue delivered with notice of trial for the sittings after that term; before trial mistakes were discovered in the declaration, which was amended by leave; it was agreed the cause should be tried the same sittings, in case defendant chose to waive pleading *de novo*.—He did plead *de novo*: and notice of trial was then given for sittings after M. T. 1794.—Two days before trial, plaintiff discovered mistakes in the amount of the sums stated to be lent, and the interest received. In Hil. T. 1795, he applied to amend; Court refused, on account of the extraordinary delay throughout the whole of the proceeding: they said, it was against the policy of the law, that penal actions should be kept suspended over the heads of defendants; and the statute of *El.* was passed in order that they should be proceeded upon with all expedition. *Steel qui tam v. Sowerby*, 6 Term Rep. 174. 8 Term Rep. 30. S. P. If there be great delay in proceeding in penal actions, court will not suffer an amendment in substance.

But the court will permit an amendment to be made in a penal action, after the time limited for bringing another action, provided there is no unnecessary delay. 6 Term Rep. 543. *Maddock qui tam v. Hammett*, 7 Term Rep. 55. But not if it introduce any new substantive cause of action or any new charge. S. C. After time limited for bringing another action.

If on entry to avoid a fine, the demise is laid previous to the entry, and plaintiff would be barred by the fine, if he had been put to bring a new ejectment; it may be altered on paying costs. *Doe v. Pilkington*, 4 Burr. 2147. Demise in ejectment amended.

The term in ejectment being near expiring, it was amended without any consent. 2 Str. 1272. *Oates v. Shepherd*. Term in same.

After verdict in ejectment for a messuage and tenement. the court will give leave to enter a verdict according to the judge's notes for the messuage only, (pending After verdict.

a rule to arrest the judgment) without obliging the lessor of the plaintiff to release the damages. *Goodtitle ex dem. Wright v. Strong*, 8 East. 357.

Amendment by laying the promise as made to the executor.

If plaintiff declares as executor, on a promise to the testator, and the statute of limitation pleaded, and issue joined, plaintiff may on motion amend, by laying the promise as made to himself, on payment of costs, and liberty for defendant to plead *de novo*. *Str.* 800. *D. of Marlborough v. Widmore*.

A bill of Middlesex.

A bill of *Middlesex* filed of record as of the 24 Geo. 3. when it ought to have been made of the 25th, may be amended agreeable to the truth. *Green v. Rennet*, 1 Term Rep. 782. There is a distinction between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. As in the case of execution, if the clerk enter judgment *de bonis propriis*, instead of *de bonis testatoris*, and error is brought, this court will order the entry to be amended, even if the record is sent back from the Exchequer-chamber. *Ibid.* Per Buller, J. See 6 Term Rep. 1. 3 Term Rep. 349. *Rees v. Morgan*.

After demurrer and argument.

After demurrer and argument only, court gave leave to amend. *Giddins v. Giddins*, cited 1 Burr. 321. So where the demurrer is first argued, and before any trial of the issues. *Ibid.* But after verdict on the issues, and contingent damages found upon the demurrers, the court refused. *Robinson v. Rayley*, 1 Burr. 316. nor can the demurrer be withdrawn after trial and verdict. *Ibid.* After demurrer and joinder, either party may amend. 2 Salk. 520. 2 Str. 846. After demurrer to plea argued and stood over, the court gave plaintiff leave to withdraw it, and reply to the plea. *Say. Rep.* 316. But *vide Say. Rep.* 116. 1 Burr. 321.

As to amendment of a subsequent term.

Where a verdict was given, for a sum exceeding the damages in the declaration, and judgment entered for the same, and a writ of error upon the judgment, assigning, that for cause, the court allowed the plaintiffs to amend the judgment and transcript in a subsequent term to that in which the judgment was signed by entering a remittitur for the excess. *Usher and another, v. Dansey and others*, 4 Maule and Selw. 94.

Court will not after rule of reference en-

Where a verdict is taken for the damages in the declaration, subject to a reference of all matters in difference, the court will not give leave to increase the sum

in the declaration and rule of reference, upon affidavit, that a larger sum might probably be proved before the arbitrator. *Pearce v. Cameron*, 1 *Maule and Selw.* 675. *large the damages in the declaration.*

After argument on special demurrer, and before the court gave judgment, leave was given to amend. *2 Str. murrer.* 954. *Bishop v. Stacey.* This is now done daily.

An amendment of a plea after two terms was allowed. *Waters v. Bovel*, 1 *Wils.* 223. *Of a plea after two terms.*

Motion to amend in a *qui tam* action, after record withdrawn, from 100l. to 88l. *Aston, J.*—The courts have gone a great way in allowing amendments, towards the attainment of justice: They have amended in cases where the limited time of bringing an action would run against the plaintiff, if he were to be put to bring a new one. 1 *Str.* 890. There is no distinction between *qui tam* actions and civil actions, where an amendment at common law is applied for. The court will not alter the charge, indeed, but the amendment here prayed will not do that; it is only to alter the sum of 100l. to 88l. and the penalty will be consequently reduced. Rule absolute, on payment of costs. *Mace qui tam v. Lovett*, 5 *Burr.* 2833. But it would be contrary, if it was to make a new charge, or materially change the offence. *Hodges v. Teale*, cited in *S. C.* Vide *Bonfield qui tam v. Miller*, 2 *Burr.* 1098, which was an amendment in the altering the date of the note, all the pleadings being in paper: Lord *Mansfield* said that whilst all is in paper you may amend. The statutes of amendment do not extend to penal actions. This is an amendment at common law. *An amendment made in a qui tam action after record withdrawn.*

So by inserting a special memorandum on record of the day when plaintiff's bill was filed, after error brought. *7 Term Rep.* 474. *Dickinson v. Plaisted.* But all amendments of this sort, are in the discretion of the court. *Ib.* 703—5. *Special memorandum.*

After issue joined on a *nul tiel* record of outlawry, the declaration may be amended by intituling it of the day it was actually delivered. 1 *East*, 133. *Coutanche v. Le Ruez.* *After issue joined on nul tiel record.*

After judgment arrested, the court refused to amend, on payment of costs, the declaration. *Collins v. Gibbs*, 2 *Burr.* 899. *After an arrest of judgment.*

All rules to amend are upon payment of costs. *Loft Costs.* 156.

To enable the defendant to plead a tender, the declaration will be ordered to be intituled specially. *Smith v. Key*, *Ibid*, 638.

After verdict found on some issues.

After verdict found on some issues, and demurrer argued as to others, application made to withdraw the demurrers and plead, court refused. *Burr.* 316. *Robinson v. Rayley*. The court will not allow the plea to be amended after demurrer, when plaintiff has lost a trial. *Rep. in temp. Hard.* 171.

Variance in the name of attorney.

A variance between the name of the attorney for the plaintiff in the warrant on the roll, and in the memorandum of the issue, was suffered to be amended after error brought, and the variance assigned for error on payment of costs of the writ of error. *Richards qui tam v. Brown*, *Dougl.* 114. *Vide* 2 *Str.* 807. 2 *Lord Ray.* 1532. 1 *Term Rep.* 782.

After verdict and joinder in error.

Verdict on the first issue, and no notice taken of the last, after error and joinder in the House of Lords; this court allowed it to be amended by the judge's notes on payment of costs. *Petrie v. Hannay, Bart.* 3 *Term Rep.* 659.

Another amendment after assignment of errors.

On a writ of error in the Exchequer-chamber, it was assigned for error, on a judgment on demurrer to the plea, that the damages *occasione detentionis debili* were not said to be awarded *ex assensu suo*; and *Pengelly*, C. B. having doubts whether the case was within 16 & 17 *Car.* 2. c. 8. s. 1. the court of B. R. was moved, and amended the judgment in the original record, and the transcript being afterwards amended, the court of Exchequer-chamber affirmed the judgment. *Gully v. Sparkes*, 2 *Str.* 869.

Continuances.

The entering of continuances, or other ministerial acts, are amendable after the term, at common law. 1 *Str.* 139. 7 *Term Rep.* 618. S. P.

Ca. sa.

A *ca. sa.* may be amended after executed by the judgment roll in the return, and made to a right day, although it stated a wrong one in the term. This was ordered in *Trinity-term*, 31 *Geo.* 3. *Vide* 2 *Black. Rep.* 836, and *Barnes*, 10. *Say. Rep.* 12. 2 *Term Rep.* 737. 3 *Term Rep.* 657. A *testatum* amended by making it conformable to the judgment, and to sue out a *ca. sa.* to warrant it. 6 *Term Rep.* 450. *Shaw v. Maxwell*.

Execution.

The court permitted an amendment in a writ of execution, by altering the sum in the writ, after a motion to

discharge one of the defendants, without costs. *Laroche v. Wasbrough*, 2 Term Rep. 377.

So they permitted one of the names of the plaintiffs *Ca. sa.* who was dead after *ca. sa.* executed, to be struck out. *Newnham and another v. Law*, 5 Term Rep. 577.

A verdict may be amended by the judge's notes, and entered only for the plaintiff on the good counts, though a general verdict and entire damages. *Eddowes v. Hopkins, ex. Dougl.* 375. Verdict amended.

If there be a special verdict, the court will amend it by the notes of counsel, or even by an affidavit of what was proved on the trial. 1 Str. 514. Special verdict.

Amendments may be made after error brought; and it is settled, that costs shall be allowed plaintiff in error, provided the amendment be made after final judgment, and the plaintiff after notice of the amendment, do not proceed further. 2 *Ld. Ray.* 897. But if the amendment be made before final judgment, 1 *Ld. Ray.* 95. or the plaintiff proceed after notice, he shall not be allowed his costs. 1 *Salk.* 49. *Vide* 2 *Str.* 837. *Cro. Jac.* 429. 628. *Hardr.* 505. 1 *Wils.* 337. See title *Error*. After error.

— on — next after — in the — year of king *Geo.* 3.

A. B. } It is ordered that the plaintiff have leave to
v. } amend his declaration, &c. (or the defendant
C. D. } to amend his plea, &c.) by inserting (or striking out,) (setting out the nature of the amendment) upon payment of costs to be taxed by the master, (if so directed.) Upon the motion of Mr. Rule to amend.

By the Court.

SET-OFF.

At common law, if the plaintiff was more indebted to the defendant, than the defendant was indebted to him, yet the defendant had no method to strike a balance, but could only go into a court of equity, for doing of what is most clearly just and right to be done: and in order to prevent such expence, by stat. 2 *Geo.* 2. c. 22. s. 13. it is enacted, "That where there are mutual debts between the plaintiff and defendant, and if either party sue, or be sued as executor or administrator, where there are mutual debts between the testator or intestate, one At common law.

" debt may be set against the other, and such matter
 " may be given in evidence upon the general issue, or
 " pleaded in bar, as the nature of the case requires, so
 " as at the time of his pleading the general issue,
 " where any such debt of the plaintiff, his testator, or in-
 " testate, is intended to be insisted on in evidence, *no-*
 " *tice* shall be given of the particular sum or debt so in-
 " tended to be insisted on, and upon what account it
 " became due, or otherwise such matter shall not be
 " allowed in evidence upon such general issue." This
 clause was made perpetual by 8 Geo. 2. c. 24, s. 4. which
 enacts, " That mutual debts may be set against each
 " other, either by pleading in bar, or given in evidence
 " on the general issue, in the manner as in the 2 Geo. 2.
 " c. 22. mentioned, notwithstanding that such debts are
 " deemed in law to be of a different nature, unless in
 " case where either of the said debts shall accrue by rea-
 " son of a *penalty* contained in any bond, or specialty;
 " and in all cases where either the debt for which the
 " action hath been, or shall be brought, or the debt in-
 " tended to be set against the same hath accrued, or shall
 " accrue by reason of any such penalty, the debt in-
 " tended to be set off shall be pleaded in bar; in which
 " plea shall be shewn how much is truly and justly due,
 " on either side; and in case the plaintiff shall recover
 " in any action or suit, judgment shall be entered for no
 " more than shall appear to be truly and justly due to
 " the plaintiff, after one debt being set against the other
 " as aforesaid." (a)

Real sum due
to be set out
in plea of set-
off.

It hath been holden, that in an action on bond, the
 defendant must set forth in the plea what is really due on
 the bond, before he is entitled to set off under this sta-
 tute, and such averment is traversable. *Symonds v. Knox*,
 3 Term Rep. 65. 6 Term Rep. 460. S. P.

The nature of
a set-off.

The cases of *set-off* are understood to be in the nature
 of cross actions: it will lie on the defendant, if he sets off
 cash notes, to prove every thing necessary to constitute

(a) *Vide Bull. N. P.* 129. when a bail-bond may be
 set off.

The statutes only extend to actions founded on con-
 tracts either express or implied, but not to *torts* or actions
 of *wrong*. *Absalom v. Knight*, *Bull.* 181. *Vide Coop.*
 156.

his demand; therefore he must prove the time when he received them. *Dickson v. Evans*, 6 Term Rep. 57.

By 5 Geo. 2. c. 30. "Where it shall appear to the commissioners, that there has been mutual credit given to the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners or the assignees of the bankrupt's estate, shall state the account between them; and one debt may be set off against another, and what shall appear to be due on the balance, and no more, shall be claimed or paid on either side."

Mutual debts between a bankrupt and any other person, how to be set off.

This act is founded in good sense, and it provides that the assignees shall not recover against a debtor of the bankrupt, what was due to the bankrupt on one side of the account, without also taking into consideration the other side of the account, and seeing on which side the balance lies. Lord Kenyon. *Dickson v. Evans*, 6 Term Rep. 58.

This act founded in good sense.

One object of this act was, to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy, and then pretending he was a creditor at the time of the bankruptcy. *Grose, J. Ibid.*

It is now holden that in an action by assignees of a bankrupt, defendant may set-off a debt due to him from the bankrupt, for the assignees are the bankrupts. *Ridout v. Brouch*, Cowp. 134. *Contra* 1 Wils. 155.

Set-off in actions by assignees.

In replevin, the avowant justified under a distress for rent; the plaintiff at *nisi prius* insisted, that there was more due to him than the rent amounted to, and *Dennison, J.* refused the evidence: upon a motion for a new trial, the court held that 2 Geo. 2. did not extend to the case of a distress, for that is not an action, but a remedy without suit; they likewise declared, that it did not extend to detainee, and the like actions of wrong. *Bull. N. P.* 181.

Cannot set-off in replevin.

Where the debt is of an equal sum, there the action is barred; but if it be for a less sum than for what the action is brought, the defendant must pray to have it set-off. *Ibid.* 179. *Cooke v. Dixon*.

If the debt is an equal sum, action barred.

If the defendant's demand does not countervail the plaintiff's, he should move the court wherein the action is depending, for leave to pay so much money into court,

Defendant may move to pay money into court, and set-off.

as with his own demand will be sufficient to satisfy the plaintiff's.

Of withdrawing general issue.

Defendant pleaded the general issue, but forgot to give notice at the same time of a set-off; and upon motion in time, the court gave leave to withdraw the plea, in order to deliver it again with a notice of set-off. *Say. Rep.* 916.

Notice should contain certainty.

The notice of set-off should contain certainty; for the legislator designed them to be in the nature of cross actions, and therefore they should have that certainty, so that the plaintiff may be able to make a proper defence.

Set-off reducing demand under 40s.

A set-off reducing the plaintiff's original demand under 40s. does not affect the jurisdiction of the superior courts. So that if plaintiff recovers 1s. damages, where there is a set-off, he must have costs. *Str.* 1191. *Pitts v. Carpenter*, 1 *Wils.* 19. *S. C.* 3 *Wils.* 48. 2 *Wils.* 68. *Dougl.* 448. So if a tender be pleaded.

A debt due to defendant as surviving partner, may be set-off.

If there be a debt due to the defendant as surviving partner, it may be set-off against a demand on him in his own right. *Slipper et al. v. Stidstone*, 5 *Term Rep.* 493. 6 *T. R.* 582. *S. P.*

Mutual credit.

Mutual credit may be constituted, though the parties do not mean particularly to trust each other: as if a bill of exchange, accepted by A. get into the hands of B. and B. buys goods of A. there is mutual credit between A. and B. which may be set-off by B. though A. did not know, when he let B. have the goods, that such bill was in his hands. *Hankey v. Smith*, 3 *Term Rep.* 507. *notes.*

Annuity.

Where the grantor of an annuity set aside for a defective registry, brings an action for money had and received to recover back the consideration money paid for it, the grantor may, under a plea of set-off, set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the stat. of limitations. *Hicks v. Hicks*, 3 *East*, 16.

Defendant entitled to a particular of plaintiff's demand.

As the defendant is entitled to the particular of the plaintiff's demand, it is now the practice, that the plaintiff should have a particular of the defendant's demand, in which he means to set-off. This is done by summons; and if such particular is not delivered within the time limited by the order, the defendant is precluded from giving evidence in support of his set-off.

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due until after the act of bankruptcy, and was then outstanding in the hands of third persons; yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set-off the same, under the words *mutual credit* in the 5 Geo. 2. c. 30. *s. 28. Smith and others v. Hodgson, 4 Term Rep. 211.*

To an action on a promissory note, the plaintiff took a verdict for the whole sum; the defendant had, at the same sittings, an action against the plaintiff for lll. to which there was a notice to set-off for the note of hand: court held, that notwithstanding the verdict, the note of hand might be set-off, for if at the time of the action brought, there are mutual demands, they, by the statute, may be set-off, and justice may be done by entering a *remititur* on the first record as to so much. *2 Burr. 1229. Baskerville v. Brown, et & contra.*

Two causes tried at same sitting, plaintiff took a verdict for his whole sum; and held, that he might still make a set-off, and after enter a *remititur*.

Debt upon a simple contract may be set-off against a specialty debt, ^a a simple contract against a debt upon an annuity-bond ^b, mutual debts between the testator and executor, without suite, simple contract against debt upon a lease for non-payment of rent^d, and all actions where the demands are of the same nature, may be set-off, and a judgment in *K. B.* may be set-off against a judgment in *C. P.* *3 Wils. 396.* But notice of set-off need not be given by defendant, in an action for money had and received to plaintiff's use, where defendant had paid plaintiff his whole demand (except what he retained for his labour and service.) *4 Burr. 2133. Dale v. Sollet.*

In what actions there may be set-off.
^a Bul. N. P. 175.
^b *2 Burr. 929.*
^c Bull. N. P. 75.
^d *Ibid. 177.*

But debt due to a man in right of his wife, in an action against him, on his own bond, cannot be set off, ^e nor can a penalty upon articles of agreement, though forfeited, ^f nor simple contract for clothes to a bail-bond, ^g nor can there be a set-off in replevin, though the distress was taken for rent.^h

In what cases a set-off cannot be pleaded, or notice given.
^e Bul. N. P. 175.
^f *Ibid.*
^g *Ibid.*
^h *Ibid. 177.*

A joint debt cannot be set-off against a separate demand, nor a separate debt against a joint one. *Sed vide Peake's Cas. N. P. 197. 2 Esp. N. P. Ca. 469, 524.*

Joint and separate demand.

Nor can defendant sued as executor or administrator set-off a debt due to himself personally, nor if sued for his own debt, can he set-off what is due to him as executor or administrator. *5 T. R. 493.*

Executor or administrator cannot set-off debt due to himself.

In an action brought by the assignees of a bankrupt for money due to the bankrupt, the defendant may plead a

May set-off to an action at.

assignees of a bankrupt. set-off of money due from the bankrupt to him; but if some of the counts are for debts arising since the bankruptcy, he cannot plead a set-off as to those counts. *Ridout v. Brough*, *Coop. Rep.* 133.

Cash notes cannot be set-off ats. assignees, unless they came to hand before bankruptcy. To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, defendant cannot set off cash notes issued by the bankrupt payable to bearer bearing date before his bankruptcy, unless he shews further that such notes came to his hands before the bankruptcy. *Dickson & al. ass. v. Evans*, 6 *Term Rep.* 57.

Difference between payment and set-off. There is a great difference between a payment and a set-off; the former may be pleaded to an avowry, though the latter cannot. That is a good payment which is paid as part of the rent itself in respect of the land: but a set-off supposes a different demand, arising in a different right. Therefore it was held, that to an avowry for rent in arrear, the tenant may plead payment of a ground rent to the original landlord. *Sapsford v. Fletcher*, 4 *Term Rep.* 511.

The plea of set-off must state plaintiff's being indebted at the commencement of the suit, and not at the time of the plea pleaded. It is said, that a judgment obtained by a defendant against the plaintiff after declaration delivered, and before plea pleaded, may be pleaded as a set-off. *Reynolds v. Beerling*, 3 *T. R. n. a.* And that, although it do not appear, that the cause of action, on which the defendant's judgment was obtained, was prior to the commencement of the plaintiff's action. But in *Evans v. Prosser*, 3 *T. R.* 186. it was determined, that a plea of set-off, that plaintiff was indebted to the defendant at the time of the plea pleaded, is bad; for it should state that he was indebted at the commencement of the action; and *Bulwer*, Justice, said, that on looking into the case of *Reynolds v. Beerling*, he found it could not be supported.

No objection to a plea of set-off, that defendant has brought an action for same sum. It is no objection to a plea of set-off, that the defendant has brought an action against the plaintiff, for the same sum, in which the plaintiff has paid the amount of the demand into court. *Evans v. Prosser*, 3 *T. R.* 186.

Partner or executor. Where a partner or executor brings an action in his own right, for money received after the death of the other partner or testator, the defendant may set off whatever was due to him from the plaintiff. *Smith v. Barrow*, 2 *Term Rep.* 476.

Where the debt is not by way of penalty. If two agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is pre-

pared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of weekly damages, and may be set-off by the obligee in an action brought against him by the obligor who executed. *Fletcher v. Dyche*, 2 Term Rep. 32.

In debt upon an annuity-bond, the defendant, after oyer, pleaded a set-off for 500l. for money lent exceeding the yearly sum incurred for the annuity, and offered to set off as much, &c. and on demurrer, the plea was holden good. *Collins v. Collins*, 1 Burr. 820.

Money lent may be pleaded to debt on annuity-bond.

If an action is brought by or against a trustee, a set-off may be made of money due to or from the *cestui que trust*. 1 Term Rep. 622. *Winch v. Keeley*. 7 T. R. 359.

Trustee.

A debt barred by statute of limitations cannot be set-off; if pleaded, the plaintiff may reply the statute; if it is given in evidence, plaintiff may object to it. *Bull*. 176. *Str*. 1271. *Remington v. Stephens*.

A debt barred by statute of limitations, cannot be set-off.

A defendant may, after pleading the general issue, move to withdraw it, and plead a-new with a set-off. *Str*. 1267. *Blackburn v. Matthias*, 1 Term Rep. 693.

May after plea of general issue move to withdraw and plead anew.

A broker with a commission *del credere*, cannot prove under a notice of set-off, a loss upon a policy happening before a bankruptcy, in an action by the assignees of the bankrupt for premiums upon policies underwritten by him, and for which he had debited the broker; but such a loss may be set-off under the general issue. *Grove v. Dubois*, 1 Term Rep. 112. *Vide* 28th sect. of 5 Geo. 2. c. 30. See 285. *Ibid*.

A broker with commission *del credere*, cannot prove a loss under notice of set-off.

A judgment can be pleaded by way of set-off though a writ of error be pending thereon. *Evans v. Prosser*, 3 Term Rep. 187. *Reynolds v. Beerling*, *ib. n. a.*

Error depending.

This court permitted three defendants to set-off a judgment, recovered by them against the plaintiff, against a judgment obtained by the plaintiff against them jointly (subject to the attorney's lien) though the plaintiff had also a separate demand on one of the defendants. *Glaister v. Hower*, 8 Term Rep. 69.

Three defendants to set-off a judgment recovered by them against plaintiff.

If a factor who sells under a *del credere* commission, sell goods as his own, and the buyer knows nothing of the

If factor under a *del credere* commission sell goods as his own.

principal, the buyer may set-off any demand he may have on the factor against the demand for the goods made by the principal. *George v. Clegett*, 7 *Term Rep.* 359.

Prisoner discharged, fresh security.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of a mere informality, the judgment is satisfied, and cannot be set-off against any demand of the prisoner. 1 *Term Rep.* 557. *Jacques v. Withy*.

Uncertain damages cannot be set-off.

To an action of covenant for rent, the defendant cannot set-off any uncertain damages that he may be entitled to recover against the landlord, or any of the covenants in the lease. *Weigall v. Waters*, 6 *Term Rep.* 488.

Costs in case plaintiff does not recover 40s. where the original demand is reduced under that sum by set-off.

Where the plaintiff's original demand was 43s. and a set-off of 4s. reducing it to 39s. for which the plaintiff had a verdict: court held, on a motion for a suggestion on the court of conscience act, that there is a difference between the case of mutual debts subsisting where the plaintiff's demand is more than 40s. the defendant's demand reducing it to a less sum; and the case where the plaintiff's original demand was more than 40s. and the defendant, before the commencement of the action, hath by payment in part, reduced it to less than 40s. In the first case, the plaintiff must sue here, or lose part of his demand, because he does not know whether the defendant can or will set-off any demand against him; but in the latter case, the plaintiff well knowing that he hath been paid such part of his original demand as reduces it to less than 40s. hath no right to come to this court and demand more than 40s. but must go to the county court. In the first case mutual debts are at the commencement of the action; in the latter case not: for payment of part by the defendant to the plaintiff himself, is not a debt owing by the plaintiff to the defendant, but a discharge of the plaintiff's demand *pro tanto*. No set-off is used or is necessary in such case, but payment of part is proved under a *non assumpsit*. Rule discharged. *Gross v. Fisher*, 3 *Wils.* 48. 1 *Str.* 1191. 1 *Wils.* 19. But if verdict be for less than 40s. without a set-off, if he live within the jurisdiction of the court of conscience with the plaintiff, he may pray a suggestion and have costs. 2 *Wils.* 68.

Doug. 448.

Where a broker effected policies of assurance in the name of his principal upon a *del credere* commission; held that he could not set off losses which happened on those policies in an action by the under-writer to recover premiums; although the losses claimed were total, and the broker had accounted for them with his principal. *Cumming v. Forester and others, Maule and Selw.* 494. See also *Koster and others, Assignees of Swan, (bankrupt) v. Eason, 2 Maule and Selw.* 112.

A broker cannot set-off losses which have happened on policies, though the losses were total, and the broker had accounted for them.

A plea of set-off, for money due on a recognizance, and also for money due upon promises pleaded to an action, of debt on bond, as if to an action of assumpsit, was holden to be a nullity, and plaintiff might sign judgment. *Penfold v. Hawkins, 2 Maule and Selw.* 606. *Blewitt v. Marsden, 10 East, 237.*

When a plea of set-off may be treated as a nullity.

In affidavit for goods sold and delivered, defendant may set-off money due upon plaintiff's acceptance, of which defendant has become holder, since the sale, and before the delivery of the goods, though he has agreed to give plaintiff ready money for them. *Cornforth v. Rivett, 2 Maule and Selw.* 510.

Defendant may set-off plaintiff's acceptance.

The defendant cannot plead by way of set-off a bond debt of the plaintiff assigned to the defendant by another, to whom, and for whose use it was originally given. *Blake v. Tinkler, 16 East, 36.*

Defendant cannot set-off a bond debt of plaintiff to which he is only assignee.

OF NOTICES TO ASSIGNEES, &c.

Of Notices to Assignees of the Defendant's Intention to dispute the petitioning Creditor's Debt, Trading, or Act of Bankruptcy.

Besides the notice of set-off, it is necessary in actions brought by or against the assignees of a bankrupt, for the other party to give a notice in writing, of his intention to dispute the petitioning debt, trading, or act of bankruptcy, it being enacted by the stat. 49 Geo. 3, c. 121. s. 10. that "in any action brought, by or against any assignee of a bankrupt, the commission of bankruptcy, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party

“ in such action, shall, if defendant, *at or before the time of his pleading* to such action, and if plaintiff, *before issue joined* in such action, give notice to such assignee that he intends to dispute such matters, or any of them; and where such notice shall have been given, if such assignee shall at the trial, prove the matter so disputed, or the other party shall at the trial, prove the matter so disputed, or other party shall at the trial, admit the same; the judge before whom the cause shall be tried, shall if he see fit grant a certificate, that such proof, or admission, was made at such trial, and such assignee shall be entitled to the costs to be taxed by the proper officer, occasioned by such notice; and such costs, in case the assignee shall obtain a verdict, shall be set-off, or deducted from the costs which such other party would otherwise be entitled to receive from such assignee.”

Notice must be given by plaintiff before issue joined.

A notice, by the *plaintiff* of his intention to dispute the act of bankruptcy, served at the time the issue is delivered, with notice of trial at the back of it, is not sufficient: it must be delivered *before issue joined*. 4 *Campb.* 207.

The notice is not to be considered as part of the regular evidence.

The notice given by a defendant, under the above act, is not to be considered as part of his regular evidence in the cause, but may be proved at the beginning of the trial, and immediately puts the plaintiff upon strict proof of the trading, petitioning creditor's debt, or act of bankruptcy. 2 *Campb.* 324.

If no notice be given.

If no notice be given, that the validity of the commission is meant to be disputed, the petitioning creditor's debt is held to be proved by the deposition of the petitioning creditor himself before the commissioners. 2 *Campb.* 493.

If defendant pleads general issue without notice, he cannot afterwards deliver another plea with notice.

A defendant in an action, by the assignees of a bankrupt, pleads the general issue, without giving notice of his intention to dispute the bankruptcy, but before the time for pleading expires, delivers the general issue again with notice, such notice is insufficient. The defendant in such case ought to move for leave to withdraw his plea. *Poole, assignee of Lukin, a bankrupt v. Bell, and another Sheriff of London*, 1 *Stark. N. P. Rep.* 328.

If no notice

In an action of *trespass*, brought by a bankrupt

against his assignees, to try the validity of the commission, although they are not named assignees, on the record, if the plaintiff do not give any notice under the above act, the commission, and proceedings under it are, *prima facie*, evidence to prove the trading, petitioning creditor's debt and act of bankruptcy. 3 *Campb.* 251. 4 *Campb.* 207. though the plaintiff may, notwithstanding, call witnesses to contradict the depositions respecting them. 3 *Campb.* 424.

is given, it is *prima facie* evidence of trading.

Though the defendant has not given notice that he intends to dispute the proceedings under the commission, he may nevertheless give evidence to disprove the act of bankruptcy. *Mills, assignee of E. Chambers and others bankrupts, v. Bennett, 2 Maule and Selw.* 556.

Though defendant has not given notice of disputing, &c. yet he may give evidence to disprove the act of bankruptcy.

In the King's Bench.

A. B. and C. D. suing as assignees, &c. of E. F. a Bankrupt
and Plaintiffs,

E. H. Defendants.

Take notice, that the defendant intends to dispute the petitioning creditor's debt, trading and bankruptcy of the above-named E. F. on the trial of this cause. Dated, &c.

Form of notice of defendant's intention of disputing petitioning creditor's debt, &c.

Yours,

L. M. Defendant's attorney, &c.

To A. B. and C. D. the above named plaintiffs, and to Mr. J. K. their attorney, &c.

OF PAYING MONEY INTO COURT.

THIS practice was introduced for the sake of giving a party (who never had it in his power to make a tender, or neglected to make one) an opportunity of satisfying the debt for which the action had been commenced, and likewise to deliver him from the necessity of proving the tender, if he had made one. 1 *Ld. Ray.* 255.

Why introduced.

And it is allowed in cases where an action is brought upon contract, for the recovery of a debt, which is either certain or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury, it is right and reasonable to admit the defendant to pay the money into court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept

When allowed.

it, he shall proceed at his peril. *Hallet v. East-India Co.* 2 Burr. 1120. *Lord Mansfield*.

When the dispute between the parties is not whether any, but what sum of money is due to the plaintiff, it is necessary that so much as is acknowledged by the defendant, be brought into court; that is, paid into the hands of the proper officer for the use of the plaintiff, who may at any time, either before or after trial, though nonsuited, receive the same, the defendant having confessed so much to be due.

May take an objection to the action, though money be paid into court.

Payment of money into court, is only an acknowledgment that the plaintiff is entitled to recover the sum so paid, but it does not preclude the defendant from taking any objection to the action beyond that sum; though unless such sum were paid, such objection would be a bar to the plaintiff's action. *Cox and another v. Parry*, 1 Term Rep. 464.

Payment of premium on policy of insurance generally, is an admission of the contract stated in the special count.

In a special count on a policy of insurance, the risk was stated to continue until the ship was unloaded, and there were common counts. It was held that the premium having been paid into court, generally, was an admission of the contract stated in the special count, and that it was not competent to the defendant to shew that the policy by which the risk was originally made to cease after the ship had moored twenty-four hours in safety, was altered by the broker without the defendant's knowledge. 9 East, 325. *Andrews v. Palegrave*.

May be paid into court before plea, and after, by a judge's order.

Buller, J. Where the defendant is entitled to pay money into court, it is a matter of course before plea pleaded, 1 Wils. 157. and now, even after plea, it is perpetually done by obtaining a judge's order for that purpose. No inconvenience ensues to either party from this practice, because, if an expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of justice; for if the defendant pays into court what is really due, the plaintiff ought in justice to really take it. That is the case in general. *Griffiths v. Williams*, 1 Term Rep. 710.

In what actions money may be paid into court.

In actions on the case upon *indebitatus assumpsit*, where there is a *quantum meruit*, Str. 576.; debt for rent; 1 Salk. 596.; covenant for non-payment of rent, Barnes, 198.; but not for repairing, Salk. 596. covenant in a certain sum, as 11l. for not dressing corn, 2 Barnes,

229.; 5l. for advanced rent for ploughing meadow ground, 2 *Black. Rep.* 837; to find diet and lodging or pay 10l. 8 *Mod.* 305.; replevin, where defendant avows for rent in arrear, *Salk.* 596.; ejectment for rent, stat. 4 *Geo.* 2. c. 28.; non-payment of mortgage-money, *Str.* 413.; upon a charter-party of affreightment, where the breaches are only for freight and demurrage, 2 *Burr.* 1120. Trover Trover. for goods not being ponderous, the plaintiff has been ordered to shew cause why he should not accept them, *Barnes*, 200.; trover for money, 1 *Str.* 142. So in trover for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damage above its real value, but that its real and ascertained value must be the sole measure of the damages, 3 *Burr.* 1363. *Fisher v. Prince.* *Barnes*, 281. Debt for 5l. for killing a hare, *Str.* 1217.; for penalties on the game laws, being an action popular, 2 *Black.* 1052.; upon a policy of assurance, stat. 19 *Geo.* 2. c. 37. s. 7.; may be brought into court upon the common rule of course, and also at the suit of an executor, *Str.* 796. But in covenant upon a charter-party, where the breach is not for payment of money, and trover, and debt for a penalty, the court must be specially moved upon an affidavit of the facts; but the statute 24 *Geo.* 2. c. 44. (a) in actions against justices of peace, and against officers of excise and customs, 23 *Geo.* 3. c. 70. s. 33. 24 *Geo.* 3. Sect. 2. c. 47. s. 35. allows money to be brought into court where they have neglected to make a tender of amends before action brought, or shall have tendered insufficient amends. (b)

When court must be specially moved.

Where an action of covenant is brought on a lease for non-payment of rent, and not repairing, the court will make a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be staid; and as to the other breaches, that the plaintiff may proceed as he shall think fit. 1 *Wils.* 75. *Anon.* 2 *Salk.* 596. Also 2 *Bl. R.* 857. This is a special rule.

When a special rule may be obtained.

In an action on a policy of insurance—There were If the defendant pay money into court

(a) This seems to be the first statute which allows money to be brought into court, in an action for general damages.

(b) See also the stat. 13 *Geo.* 3. c. 78. s. 79. & 13 *Geo.* 3. c. 84. s. 81. as to bringing money into court by persons acting under the general highway and turnpike acts.

upon some of the counts only, and plaintiff takes it out, he is only entitled to costs of those counts.

several counts. The defendant paid money into court on *some*, which plaintiff took out. And the master taxed costs on those counts. Motion to review the taxation, and allow costs on all the counts: Lord *Kenyon*. When a defendant pays money into court on some of the counts only, it is saying, in other terms, that he admits that the plaintiff has cause of action against him to a certain extent, but that he means to defend himself against the charges contained in the other counts, and the plaintiff, by taking the money out of the court, precludes himself from all right to the other counts. Rule refused. *Baillie v. Cazalet*, 4 *Term Rep.* 579. 9 *East*, 79. *Godsall v. Baldero*. See 3 *B. & P.* 556.

The defendant is bound if he pay the money.

The only case where the party shall be bound by the payment of money, though by mistake, is where it is paid into court, under a rule of court. 2 *Term Rep.* 645. *Malcolm v. Fullarton*.

Debt for rent may pay money into court, but not in debt on record, specialty or statute.

Formerly this court refused, in debt for rent, leave to pay money into court. *Cas. Temp. Hard.* 173. But there is a distinction between those actions of debt, wherein the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute, giving a sum certain by way of penalty, 3 *Mod.* 41. *Cro. Jac.* 128. 498. 629. and those actions wherein the plaintiff may recover less, as in debt for rent, 5 *Mod.* 212. or on a simple contract, 1 *H. Black. Rep.* 549. In the former, the defendant cannot bring money into court, 2 *Str.* 890. though he may move to stay the proceedings on payment of the whole debt and costs; but in the latter, the defendant has been allowed to bring money into court, 1 *Vent.* 356. *Salk.* 596. because the plaintiff does not recover according to his demand, but according to the verdict of the jury.

Upon bond, money may be paid into court.

Formerly the defendant, in an action of debt upon bond, who had obtained the common rule, must have brought the whole penalty into court; but now this hardship is remedied by stat. 4 *Ann.* c. 16. s. 13. whereby it is enacted, "That if pending an action upon a bond, "with condition to be void upon payment of a less sum, "the defendant shall bring into court all the principal "money, and interest due, and costs; the said money "shall be taken to be a full satisfaction of the said bond, "and shall discharge the defendant." (a)

(a) *Per Cur.* Till bail put in, one is not in a condition to move to bring in principal, interest, and costs. 7 *Mod.* 140.

This act of parliament reforms in some instances an erroneous course of proceeding in the courts of law and equity, which ought never to have prevailed, and which the courts themselves might and ought to have remedied, but did not. Therefore it should not only have the most liberal construction, but the courts ought to exercise their own authority, to extend the spirit and reason of this parliamentary interposition, "for the easier, "speedier, and better advancement of justice" to cases not mentioned in the act. This act meant, that in cases of penalties by way of security, the clear final justice of the case should be attained in courts of law. 3 *Burr.* 1373. *Bona fous v. Rybot.*

The condition of a bond was to pay 40l. by 5l. per annum. An action was brought, and on motion the court gave liberty to bring into court the arrears on payment of costs. 2 *Str.* 814. *Bridges v. Williamson.* And it has since been held, that paying all past instalments with interest and costs is sufficient; and money not yet due was ordered to be paid to the party who brought it in. *Str.* 957. *Darby v. Wilkinson.* And the court held, that it is but reasonable they should take care not to prejudice the plaintiff, who will have a legal advantage by signing judgment; therefore ordered him to sign his judgment, but not to take out execution, until the payments became due. *Str.* 958. *S. C.*

In actions for general damages, as upon a contract, tort, or trespass, as a tender cannot be pleaded, so the defendant is not allowed to pay money into court. As in actions on the case for immoderately driving a hired chaise, and for consequential damages, *Str.* 767.; trespass for the mesne profits in ejectment, 2 *Wils.* 115.; for dilapidations, *Str.* 906. 8 *Term Rep.* 47.; debt upon a bond to a sheriff conditioned for the good behaviour of his bailiff; and, inter alia, for paying money collected for the sheriff's ease; upon a bond for the performance of a collateral agreement; upon a counter bond; trespass for taking goods; replevin, where it is not for rent, for injuring common by burning turf, in account, money cannot be brought into court.

The court refused to grant a rule to permit the defendant to pay into court the debt and costs up to a certain day after the action brought, (thereby excluding the costs of the declaration delivered,) upon the ground of an offer to pay the debt and costs up to that period, without having made a tender before action, or obtaining the common

Construction of the act.

Court gave liberty to pay arrears, the judgment standing as a security.

In what actions money cannot be paid into court.

Court will not grant a rule for defendant to pay money into court up to a certain day.

rule, for staying proceedings on payment of the debt and costs, up to the time of the application. 13 *East*. 551. *Burmester v. Hilch*.

Assumpsit against a carrier.

Assumpsit against a carrier, for delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of 20l. unless they were entered and paid for accordingly; the court allowed him to bring the money into court. *Hutson v. Bolton*, 11 *Geo. 3.* 1 *H. Bla.* 299 *in notis*.

Trespass for seizing goods.

So in trespass for seizing of goods, on the defendant's restoring them, or paying the full value with costs, court will stay the proceedings. 7 *Term Rep.* 53. *Pickering v. Trustee & an.*

Demand for unliquidated damages.

Payment of money into court, where the demand is for unliquidated damages by a judge's order after plea, is irregular; but if the plaintiff take the money out, he waives the irregularity, and cannot afterwards have a verdict, unless he recovers more than the sum paid in. This was an action for negligence. *Griffiths v. Williams*, 1 *Term Rep.* 710.

May be brought into court in debt for an annuity; but not if there be an agreement to pay absolutely at a day certain.

Money may be brought into court in debt for an annuity, 3 *Burr.* 1373.; but where a bond is given for a gross sum, absolutely at a day certain, viz. April 1750, and an agreement in January, 1758, was entered into, that the money should be payable by instalments, with proviso that the sums agreed to be taken by instalments should be punctually and regularly paid by defendant, at and upon the very days specified in the defeasance for making the respective payments, otherwise to be void; yet where defendant made two payments good, and neglected one, the court would not allow him to bring that sum and costs into court. 3 *Burr.* 1370. *Bonafous v. Rybot*.

False return.

Court refused money to be paid into court, in an action for a false return of a *fi. fa.* 7 *Term Rep.* 335. *Bowles v. Fuller*.

Dilapidations.

So in an action for dilapidations. *Salt v. Salt*, 8 *Term Rep.* 47.

The court will order satisfaction to be entered on the record in an action on a bond of indemnity on the defen-

Action on bond to indemnify the parish officers of *Ripley* against any expence that they might be put to by the expected birth of a bastard child of *J. Shaw*, (by defendant and others the parish officers of *Ashby de la Zouch*,) a parishioner of *Ashby de la Zouch*, but then resident in *Ripley*. Rule why on payment of 40l. the penalty of the bond, together with the costs, satisfaction

should not be entered on record. *Lord Lonsdale and others v. Church*, 2 Term Rep. 388. was cited against the rule, where it was held, that in an action on a bond, damages may be recovered beyond the amount of the penalty. *Lord Kenyon*: I cannot accede to the doctrine in the case cited: according to that, an obligor, who became bound in a penalty of 1000*l.* conditioned to indemnify the obligee, may be called upon to pay 10,000*l.* or any other larger sum however enormous. Suppose the plaintiff proceeds in this action, and no defence is made to it, the judgment would be for the penalty of the bond, and 1*s.* nominal damages for the detention of the debt. But here the defendant is willing to pay the whole penalty and costs of the action, and the plaintiff is not entitled to more. In actions on bonds, on any penal sums for performance of covenants, &c. the act of parliament 8 & 9 W. 3. c. 11. s. 8. expressly says, that there shall be judgment for the penalty; and that the judgment shall stand as a security for further breaches; but the obligor is not answerable in the whole beyond the amount of the penalty. Rule absolute. *Wilde v. Clarkson*, 6 Term Rep. 503.

defendant's paying the penalty of the bond, and the costs of the action.

After issue joined, plaintiff may have the money out of court, and costs to the time of paying in, he paying defendant the subsequent costs. 1 Term Rep. 629. *Willes* 191.

By rule, 5 Jac. 1. 20*s.* for every 100*l.* to be paid to the secondary of the chief clerk for keeping the money, if under 10*l.* two shillings, and so according to that rate for every greater or lesser sum.

Chief clerk's fees.

If plaintiff's attorney takes the money out of court, he must get an office copy of the rule, pay 8*s.* take same to Messrs. Provost and Chambre, who will pay the money, deducting the poundage and receipt.

If plaintiff accepts the money.

Cur. gave leave to withdraw the general issue in order to bring money into court, and replead it, not delaying the plaintiff. *Str.* 1271. 1267. *Ray.* 316.

May withdraw plea, and pay money.

In actions of trespass against justices of the peace, &c. for acts done by them *ex officio*, bringing money into court seems to be an admission of the right of action. 13 East, 202.

In actions against justices.

HOW TO PAY MONEY INTO COURT.

In order to pay money into court upon actions, where there can be no doubt but that you may pay the same in, give instructions to counsel for that purpose, with 10*s.* 6*d.* indorsing thereon, "please to move to pay 20*l.* into

Method of paying money into court.

"court," and on his signing it, take it to *Messrs. Hoares*, bankers in *Fleet-street*, who will receive the money, and give a receipt for it, which take to *Messrs. Provost and Chambre*, the signers of the writs in the King's Bench office, who will give a receipt; take the brief and receipt to the clerk of the rules, *Symonds-Inn*, who will draw up the rule, pay 8s. serve copy on plaintiff's attorney, and at the same time, deliver plea, if general issue, or if special file it; if plaintiff accepts the money in full discharge of his suit, he is to have costs taxed, to the time the money is paid into court. (a)

If plaintiff accepts it, how proceed.

Bank of England notes in Great Britain, and bank of Ireland notes in Ireland, to be good payment to officers of any court, or by officers out of any court, on any process, rule, or order.

By stat. 52 Geo. 3. cap. 50. sect. 7. It is enacted that in all cases in which any sum or sums of money is or are required, ordered, directed, decreed, or adjudged, to be paid under or by virtue of any rule, order, process, judgment, decree, or other proceeding of or in any court of law or equity, or other court in any part of the united kingdom, or by any law, usage, or practice of any court is or are allowed to be paid for the staying of proceedings by any party or parties, person or persons, to any other party or parties, person or persons, or into any court, or into the hands of any officer or officers of any court as aforesaid, such payment of such sum or sums of money as aforesaid, in notes of the governor and company of the Bank of England, if the same shall be made in *Great Britain*, or in notes of the governor and company of the Bank of Ireland, if the same shall be made in *Ireland*, the same respectively being payable on demand to the amount therein expressed, shall be deemed and taken to be good and sufficient payments in the law of the sum or sums so required, ordered, directed, deemed, or adjudged to be paid; and in all cases in which any money shall be payable out of any such court or courts, or by any officer or officers thereof, or of any of them in the discharge of his or their duty as such officer or officers, payments of the sums so payable out of such court or courts, or by such officer or officers, in notes of the governor and company of the Bank of England, if in *Great Britain*, or in notes of the governor and company of the bank of *Ireland*, if in *Ireland*: (such notes respectively being payable on de-

(a) In the C. P. when the sum paid is under 5l. it is paid on a side-bar rule, which saves the expence of a motion. The poundage is only 1d. in the pound.

mand to the amount in such notes expressed) shall be taken and deemed to be good and sufficient payments in the law.

And by the 9th *sect.* every person paying such notes into court, or into the hands of the officer of the court, shall if required indorse the notes and specify the proceedings, under which they were paid, and make affidavit that they believe them to be genuine; and in case the notes are forged, the person so indorsing them shall be liable to pay the amount to the officer or to the person who takes them out of court.

The notes to be indorsed by the person paying them, and to be verified by affidavit to be bank notes.

If Plaintiff accepts the Money.

If he accepts the money, and does not proceed for further damages, it is now the practice for him to take an office copy of the rule, pay 4s. 3d. and obtain an appointment from the master, and serve same on the defendant's attorney to tax the costs; and if after taxation the defendant does not pay same, the plaintiff may deliver his issue with notice of trial, and proceed to obtain a verdict, and 1s. damages will carry the costs on producing an office copy of the rule of court, and the master's allocatur for costs. If he means to proceed for further damages, he may obtain an office copy of the rule, take the money out of court, and then deliver the issue and proceed to the trial.

If he accept the money, how to proceed.

* 4 Term Rep. 12.

Or he may apply for it afterwards, though he be nonsuited, or have a verdict against him. 2 *Str.* 1027. 2 *Term Rep.* 645. But beyond the amount of the sum brought in, bringing money into court is no acknowledgment of the right of action; and therefore if plaintiff proceed further, it is at his peril. If he proceed to trial otherwise than for the non-payment of the costs, and do not prove more to be due to him, than the sum brought in, the plaintiff on defendant's producing the rule shall be nonsuited, or have a verdict against him, and pay costs to the defendant. 5 *Com. Dig.* 20.

After verdict; may take it out.

N. B. If the money is to be paid into court a week after the term is ended, then a judge's order is requisite to authorise the clerk of the rules to draw up the rule; but in this case a counsel's hand is requisite to a brief for that purpose, as the order states, that the clerk of the rules be at liberty so to do, on producing a counsel's hand for that purpose. Fee 10s. 6d.

If paid in a week after term.

The plaintiff
to procure the
appointment.

Ordered, that in case any defendant shall pay money into court under the usual rule, and the plaintiff shall be willing to accept thereof with costs; the said plaintiff's attorney do upon an office copy of such rule, procure an appointment from the master to tax such costs, and serve the same on the defendant's attorney; and that in default thereof, it shall be considered that the plaintiff intends to proceed in the action to recover a larger sum than that paid into court. R. M. T. 31 *Geo. 3.*

If the costs
are not paid
on bringing
money into
court, the
plaintiff must
go on, and
cannot have
an attachment.

In assumpsit the defendant brought 8l. into court on the usual terms of paying costs to that time; the plaintiff took it out, and taxed his costs, and served the defendant's attorney; and they not being paid, went on to trial, and obtained a verdict for 7l. 18s. The defendant insisted that he should have no costs for his subsequent proceedings, since it appeared that he was overpaid; but the court held, that as to the costs, it was to be considered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment; but the plaintiff goes on, it being only a conditional rule. They said they would make him allow, upon the execution, the 8l. he had taken out of the court, and ordered him the *postea* to tax his whole costs. *Str. 1220. Hand v. Lady Dinely.*

In what cases
defendant not
liable to pay
costs.

There may be circumstances arise, that money may be paid into court without being subject to costs: as where a plaintiff kept out of the way to prevent a tender, and upon summons before a judge to pay debt and costs, his attorney pretended he had other demands, and so refused to name the sum, which obliged defendant to pay money into court, and apply to the court that so much of the rule as related to costs might be discharged, with costs of the application: the court looked upon these proceedings to be oppressive, and discharged the rule, but not with costs of the application. 1 *Burr. 578. Johnson v. Houlditch.*

Auctioneer.

Court held that an auctioneer had acknowledged himself liable to the action, by paying money into court. 5 *Burr. 2640. Burrow v. Skinner.*

Payment of
money is an
acknowledgment
of right
of action to
amount paid
in.

The payment of money into court, is an acknowledgment of the right of action, to the amount of the sum brought in. 2 *Term Rep. 275.* And being an acknowledgment on record, the defendant can never recover it back, though it afterwards appear he paid it wrongfully.

Ibid. 645. *Malcolm v. Fullarton*. See 2 *B. & P.* 392. and *But not be-*
my C. P. Practice for cases to this effect, 317. *But be-* *yond that*
 yond the amount paid, it is no acknowledgment of the *sum.*
 right of action. 1 *Term Rep.* 464. 5 *Term Rep.* 575. 2 *H.*
B. 374.

— next after — of the Holy Trinity, in the
 57th year of *King Geo.* the 3d.

A. B. } It is ordered that the defendant have leave to *The rule to*
 v. } bring into court 32l. and thereupon, unless the *pay money in-*
 C. D. } plaintiff shall accept thereof, with costs to be *to court.*
 taxed by Mr. *Le Blanc*, in full discharge of this suit, the
 said 32l. shall be struck out of the declaration, and paid
 out of court to the plaintiff or his attorney: and upon
 the trial of the issue, the plaintiff shall not be permitted to
 give evidence for the said 32l. Upon the motion of Mr.
 —.

By the court. (a)

The meaning of this rule is, that if the plaintiffs do *The meaning*
 not accept the sum brought into court, the same is to be *of the rule.*
 struck out of the declaration; and the plaintiffs, upon
 the trial, are not admitted to give evidence for the sum
 brought into court; and if the plaintiffs upon the trial,
 do not prove more due to them, than the money brought
 into court, there must be a verdict for the defendants.
Hallet v. E. Ind. Co. 2 *Burr.* 1120. (b)

The plaintiffs are at liberty to accept a sum brought *Freight and*
 into court, in respect to breaches assigned for non-pay- *demurrage.*
 ment of freight and demurrage, and to proceed as to any
 other breaches mentioned in the declaration (excepting
 those) if they think proper. *Hallett v. E. Ind. Comp.*
 2 *Burr.* 1121.

The question was, whether, in an action by an execu- *Executor.*
 tor, the defendant should be allowed to bring money into
 court. And on consideration it was held he might, and

(a) The Common Pleas rule differs from this; it is so
 framed, that you may have an attachment for the costs,
Barnes, 283. A copy of this rule is usually annexed to
 the plea, or otherwise served on the plaintiff's attorney.

(b) I have no doubt in case enough has not been paid
 into court, the defendant may apply to have a further
 sum paid in, on payment of costs.

that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. *Str.* 796. *Crutchfield v. Scott.*

As to costs.

The plaintiff is not entitled to costs to the time of defendant's paying money into court, after the defendant has obtained judgment, in case of a nonsuit. *Crosby and another v. Olorenshaw*, 2 *Maule and Selw.* 335.

If Plaintiff proceeds further, and accepts the Money and Costs.

Juror withdrawn, not entitled to costs up to time of paying the money into court.

If the defendant pay money into court, and the plaintiff proceed to trial when a juror is withdrawn, the plaintiff is not entitled to the costs up to the time of payment of money into court. For whenever a juror is withdrawn, each party must pay his own costs. *Buller, J.* The form of the rule decides this question; for it was part of the rule, that if the plaintiff would not accept of the money brought into court, with the costs, &c. the said money shall be struck out of the declaration; then if it be struck out, that is not considered as part of the declaration. *Stodhart v. Johnson*, 3 *Term Rep.* 657. See 2 *H. Black.* 375.

If there are further proceedings after payment of money into court, and plaintiff wishes not to go on, he is at liberty so to do, allowing the defendant the subsequent costs.

A declaration was filed of Easter term; plea and money paid into court same term. Issue delivered in Trinity term, with notice of trial for the 6th July, which was countermanded the 3d. Application was made to the defendant's attorney for the amount of costs, down to the time of paying the money into court; with an offer to allow the subsequent costs, and settle the balance whichever way it might be; the defendant's attorney refused, insisting that he was entitled to his costs from the commencement of the action. Rule "why the master should not be directed to tax the costs of the plaintiff, to the time of paying the money into court, and the defendant's costs from that time, to the countermanding the notice of trial; and why the defendant should not pay the balance to the plaintiff." *Per curiam*: On inquiring of the master, it appears to be the constant and regular practice, that the plaintiff is entitled to have his costs to the time of paying money into court, and the defendant all his subsequent costs. *Hartley v. Bateson*, 1 *Term Rep.* 629.

N. B. This now may be done by summons.

A landlord declared in debt, 1st, for the double value; 2d, for use and occupation. The defendant pleaded nil debet to the first, and tender of the single rent before the action brought to the second count, and paid money into court, which the plaintiff took out before the trial, and still proceeded; and it was held, that this was no cause of non-suit, as upon the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value, but that the case ought to have gone to the jury, and that the plaintiff's going on with the action after taking the single rent out of court, was evidence to shew that he did not mean to waive his claim for the double value, but to take it *pro tanto*. And it seems that though the single rent was paid into court on the 2d count, yet if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so paid in deducted out of the larger sum recovered. 10 *East*, 48. *Ryal v. Rich*.

The defendant having obtained a rule to amend the rule for payment of money into court, by confining it to the money counts, and a new trial being granted upon payment of costs, and the plaintiff thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial. 9 *East*, 325. *Andrews v. Palegrave*. When entitled to full costs.

After verdict for the defendant, plaintiff moved to be allowed his costs to the time of paying the money into court. *Buller, J.* Though the plaintiff was entitled to the costs up to the time of paying money into court, if application were made before trial, yet he comes too late after trial. Rule refused. *Stevenson v. Yorke*, 4 *Term Rep.* 10. But if he gives notice of trial which he neglects to countermand, whereby the defendant is entitled to judgment as in the case of a nonsuit, he is entitled to costs, up to the time of paying money into court. *Seamour v. Bridge*, 8 *Term Rep.* 408. Plaintiff comes too late after verdict.

Where money has been paid into court, short of the plaintiff's demand, and it is taken out, evidence is admissible to shew *quo animo* it was done; and it is not to be taken conclusively as an admission that the rest of the demand was unsatisfied. 5 *Esp. Ca. N. P.* 69. See 9 *East*. 325. the court will amend the rule.

Upon putting off a trial, the bail had paid a sum of Y If action abate by death.

money into court, to abide the event of the suit, and the suit having afterwards abated by the death of the defendant, they were permitted to take the money out of court, although opposed by the plaintiff, and by the administrator of the defendant. *Ward v. Lowing*, 2 *Smith's Rep.* 49. M. 45 *Geo.* 3.

After a rule for consolidating actions if money be paid into court, and plaintiff nonsuited, he is not entitled to costs to the time of paying in the same.
3 *Term Rep.* 637.
4 *Doug.* 10.

There were twelve actions on a policy of insurance. All the defendants paid money into court on one count, for money had and received (being a return of the premium) which was taken out, but plaintiff did not tax the costs. Afterwards the consolidation rule was obtained in the usual words, upon the submission of the defendants in the twelve actions to be bound by the verdict in the first action. The plaintiff was nonsuited in that first action; and the master in taxation allowed costs to plaintiff in all the actions up to the time when the money was paid into court. Rule to review his taxation. *Stodhart v. Johnson*, and *Stevenson v. Yorke*, were cited. Court said, that as the nonsuit in the action that was tried was conclusive in all the other actions, the plaintiff was not entitled to the costs in any of them, even up to the time when the money was paid into court. *Burstall v. Horner*, rule abs. 7 *Term Rep.* 373. Court thought, that according to the fair construction of the consolidation rule, the plaintiff was bound as well as defendant. (a)

TENDER.

Tender.

TENDER in a legal sense denotes as much as carefully to offer, or circumspectly to endeavour, the performance of any thing belonging to us: as, to tender rent, is to offer it at the time and place where and when it ought to be paid; and it is an act done to save the penalty of a bond, and of money for rent, or contract, before distress or action brought. It may be made in purses, or bags, without shewing, or telling the same, for it is the receiver's business to put it out, and tell it, *Co. Litt.*

(a) There may be a judgment as in case of a nonsuit, a demurrer to evidence, a plea *puis darrein continuance* after payment of money into court; for the cause goes on substantially in the same manner if the money had not been paid in at all. See 1 *H. Black.* 93. 2 *H. Black.* 375.

208. *a*; and it must be by offering the bags to the plaintiff, and not holding them under his arm. *Noy* 74. 5 Co. 115. And every tender at the common law, or which is given by statute, must be made before the writ sued out. *Brown's Tend.* 9. See 21 *Jac.* 1. c. 16. s. 5.

The defendant said, "he had the money in his pocket," When need and the plaintiff answered, "you need not give yourself not lay the money down. "the trouble of offering it, for I will not take it:" held a good tender. *Douglas v. Patrick*, 3 *Term Rep.* 684.

Payment of a debt to the plaintiff's attorney is good. Tender to an attorney. *Powell v. Little*, 1 *Black. Rep.* 8. And if an attorney properly authorised to write for the money to defendant, and he does so, saying unless he pays him he will sue out a writ, I should conceive a tender before it is sued out, to him, is good, but he must be legally authorised. *Vide Doug.* 624.

If the debtor tenders a larger sum of money than is due, and asks change, this will be a good tender, if the creditor does not object to it on that account, but only demands a larger sum. *Lord Kenyon. Black v. Smith*, asks change. *Peake's Cas.* 88.

The plaintiff and several other sailors being in a room together, defendant offered them as much money as was sufficient to pay all the crew their legal wages; but did not distinguish the particular sum due to each. The amount of the whole was 11*l.* the debt due to the plaintiff 1*l.* 5*s.* All the sailors present refused to receive less than the money that the defendant promised them, which was extorted from him by a mutinous conduct. But the defendant did not produce the money, which he had ready to pay them. In an action by one, C. J. held, that the tender was a good one, they were told there was enough to pay all, and they objected to receive it, because they wanted more. There is no occasion to produce the money, if the creditor refuses to receive it on account of more being due. *Ibid.*

In an action of covenant for non-payment of rent, defendant pleaded a tender on the day. The witness proved, that defendant went purposely to pay his rent, and said to plaintiff, "I am come to pay you for the rent," but did not put down or shew the money; and it being proved that plaintiff refused upon other ground than that of objection to the quantum, or the quality, *Buller J.* held it to be a good tender in this case. *Somerset Spring ass.* 1786. *Crompt.* 152.

What is requisite to make a legal tender.

To make a legal tender there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration, or equivalent act of the creditor: therefore where the defendant, departing from home left 10l. with his clerk for the plaintiff, of which he informed the plaintiff, when he demanded a larger sum, and the plaintiff said he would not receive the 10l. or any thing less than the whole demand, but the clerk did not offer the 10l. this was held to be no tender. 10 *East*, 101. *Thomas v. Evans*.

What does not amount to a legal tender.

An offer, to pay a sum of money, to be accepted as the whole balance due, where a larger sum is claimed, does not amount to a legal tender. 4 *Campb.* 156.

A tender by an agent, who is only authorized to tender part, tenders the whole at his own risk, is good.

But a tender, by an agent of defendant of the whole sum demanded by plaintiff, by pulling out his pocket book, and offering if he would go into a neighbouring public house to pay it, which the plaintiff refused to take, is good, although the agent is only authorized by the defendant to tender a sum short of the whole sum demanded, and offers the rest at his own risk. *Read v. Goldring*, 2 *Maule and Selw.* 36.

Subpoena.

In *Hilary* term 1785, it was held, that a subpoena in the Exchequer being sued out before tender made, was good.

Where there is a joint demand by three, and one has a separate demand on one of the three, how to plead a tender.

If A. B. and C. have a joint demand, and C. has a separate demand on D. and D. offer A. to pay him both the debts, which A. refuses without objecting to the form of the tender on account of his being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A. B. and C. *Douglas v. Patrick*, 3 *Term Rep.* 683.

If one come into possession of goods wrongfully.

Where defendant came into possession of goods wrongfully, no tender is necessary of freight, &c. paid by him in order to enable plaintiff to maintain his action. *Lempriere v. Pasley*, 2 *Term Rep.* 485.

Non est factum, and tender as to part.

To an action on a bond, *non est factum* to the whole declaration, and a tender as to part, cannot be pleaded. *Maclellon v. Howard*, 4 *Term Rep.* 194. But a tender to the whole declaration is good. Rule, *Trin.* 19 *Geo.* 3.

If a tender be made on the day bill filed,

A tender was made in the term, and before a bill filed against an attorney. The bill was filed the same day the tender made, and summons was taken out before Mr.

J. Buller to entitle the bill (which was intituled of *Hilary* though before term generally) the day it was actually filed, which was it is filed, will opposed on the ground of the tender being made before not assist de- the bill was on the file: the judge said, that it would fendant. not assist the defendant at all, for he could not take advantage of it in pleading, there being no fraction of a day. *Hil. 30 Geo. 3. (a)*

By stat. 24 *Geo. 2. c. 44. s. 24.* Tender of amends Tender by may be made by the justices of the peace, within a justices. month after notice given of an action intended to be brought against them, for any thing done by them in the execution of their office, and they may plead the same with not guilty and any other plea, with leave of the court; and in case they shall neglect to make such tender, they may, before issue joined, pay money into court.

This statute relates only to actions of tort. *Filtham v. To what the Terry, E. 13 Geo. 2. cited in Sellon, 352. Vide 2 Black. statute relates. Rep. 589. C. P.* where it was held, that it must appear he was sued as a justice for some misbehaviour in his office, before court will permit him to pay the money tendered into court.

A plea of tender *after the day of payment of a bill of exchange*, and *before the action is brought*, is *not good*; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff in respect of the bill, with interest, from the time of the default for the damages sustained by the plaintiff by reason of the non-performance of the promise, *8 East. 168. Hume v. People.*

The defendant may, to a trespass *quare clausum fregit*, Trespass. plead a disclaimer, and that the trespass was by negligence, or involuntary, and tender of sufficient amends before action brought; whereupon, or on some of them,

(a) It is no answer to a plea of tender before the exhibiting of the plaintiff's bill, that the plaintiff had, before such tender retained an attorney and instructed him to sue out a latitat against the defendant, and that the attorney had accordingly applied before such tender, for such writ, which was afterwards sued out. *Briggs v. Calverley, 8 Term Rep. 629.*

the plaintiff shall be enforced to join issue. *Stat. 21 Jac. 1. c. 16.*

Under distress for rent. Tender may be made before action, for any unlawful act done by a person who has distrained for rent, justly due, 11 *Geo. 2. c. 19. s. 20.* likewise in distraining for money justly due for the relief of the poor. 17 *Geo. 2. c. 38. s. 10.*

Pound breach. It is no answer to an action for treble damages on the stat. 2 *W. and M. c. 5.* for a pound breach, that the rent and the demand were tendered, after the distress and impounding. *Firth v. Purvis, 5 Term Rep. 432.*

Excise and Custom-house officers. Tender of amends is allowed to be made and pleaded by excise officers for any offence committed *quá* officers. 23 *Geo. 3. c. 70. s. 30.* And also Custom-house officers. 24 *Geo. 3. c. 70.*

Any money coined at the Mint, good. A tender in any money coined at the *Mint*, upon which there is the king's stamp, is good; for all such money is good in proportion to its value, without a proclamation. *Salk. 446. Comb. 387.*

Bank notes are no tender if objected to except in distress for rent, &c. Bank notes if objected to are not a legal tender, 2 *Bos. and Pul. 526. Grigby v. Oakes* (except in cases of distresses for rent and levying of money under process of execution,) in which cases these are legal tenders by 52 *Geo. 3. c. 80. s. 8.* Tender in bank notes is good in all cases if not objected to at the time on that account. 3 *T. R. 554. Wright v. Reed.*

To an avowry for damage feasant, when tender to be made. To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding; for it is not within the statute of *Jac. 1.* which goes only to trespass, where tender of amends may be pleaded to have been made at any time before action brought. *Lutw. 1596.*

In a plea in bar of tender of rent in replevin, the money ought not to be brought into court. To an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court; because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bull. 60. Salk. 584.*

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises; and then such plea is given by 11 *Geo. 2. c. 19. s. 9.*

Costs after tender made, Action of *assumpsit* on a tradesman's bill, plea of tender as to 2l. 18s. 4d. part of the demand, and *non*

assumpsit as to the rest. Verdict for defendant on the tender, and for plaintiff on *non assumpsit*, but with damages under 40s. viz. 7s. 6d. Motion for suggestion on stat. 23 Geo. 2. c. 33. s. 19. he residing in *Middlesex*. Rule discharged. *Cur.* The tender was not an extinguishment of the debt; and the question is, what appears to have been due at the time of the action brought, for if that exceed 40s. the inferior court has no jurisdiction. *Heaward v. Hopkins*, Dougl. 448.

The London court of conscience has a jurisdiction by London act. stat. 39 and 40 Geo. 3. c. 104. where it does not exceed 5l. See 5 *East*. 194.

The money is to be paid to Messrs. *Hoares*, bankers, *Fleet-street*, who will give a receipt for the same; take it to Messrs. *Provost and Chambre*, who will give a receipt on the draft of the plea, which plea is to be signed by counsel, and afterwards filed with the clerk of the papers, or delivered as the case may be. Fee to counsel 10s. 6d.

How to pay money into court on the plea.

As to the Time of Pleading.

Formerly the plea of tender was pleaded in the same manner as a plea in abatement, within the four days, but the following case allows it to be pleaded *after a judge's order*.

Formerly tender pleaded within four days.

Time was given by a judge's order to plead, until *two days before the essoign-day of this present term*, on the usual terms of pleading issuably, &c. This order was not obtained till after the four days rule for pleading was expired. Before the term, and within the time allowed by the judge's order, the defendant pleaded a plea of tender, which plea was *intituled as of the preceding term*. *Aspinall* moved to set it aside, and for leave to sign judgment. *Winn*, for defendant, said, that it was a fair, honest plea, in its own nature; and that it was within time, not being after imparlance, but as of the last term, and also that it was an issuable plea within the meaning of the judge's order; though he acknowledged that a plea in abatement (though in strictness indeed issuable) would not be so, because it tended to delay the plaintiff. The court concurred entirely in what *Winn* had urged in support of the regularity of the plea, and the motion was denied. 1 *Burr*. 59. *Kilwick v. Maidman*.

But now may be pleaded after a judge's order.

Properly the plea should be pleaded the term the de-

When to be pleaded.

claration is of, if not you must have a judge's order to plead it as of the next term.

What plea
should state,

This plea should state, *tout temps prist*, *Giles v. Hartis*, 1 *Ld. Raym.* 254. *Fort.* 376. for if the money is to be paid upon a certain day, it is no answer to shew, that at a subsequent day, he was ready to have paid it unless he were *always ready* to have paid it from the time it first became due. *Per Lord Ellenborough*, 8 *East*, 169. *Hume v. Peploe*.

And this being a plea in bar to plaintiff's demand, which is for damages; and therefore it ought to shew upon the record that he never had any such cause of action; *per Lawrence*, J. 8 *East*, 171. *Hume v. Peploe*,

When may
take it out,
though he re-
ply.

If the defendant bring money into court on a plea of tender, the plaintiff may take it out, though he reply that the tender was not made before actions brought. See 1 *Bos. and P.* 332. *Le Grew v. Coke.* (a)

Fresh Demand and Refusal.

Fresh demand
and refusal.

A right to damages, on account of non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again by a demand subsequent to the tender and refusal; a new cause of action arises from the non-payment or the non-performance thereof upon such demand, 5 *Bac. Abr.* 12. *Brownl.* 71.; and therefore the plaintiff may reply such subsequent demand and refusal by the defendant, which if proved, plaintiff must have a verdict.

If upon a tender pleaded, the plaintiff will not receive the money, but take issue upon the tender, and it is found against him, the money is lost for ever. *Co. Litt.* 207. *Hob.* 199. *Ld. Ray.* 642.

Subsequent
demand by
attorney's
clerk not
good.

Where the issue is on a subsequent demand and refusal, it should appear in evidence, that the person who made the demand was properly authorized to receive the money; that though payment to the attorney while an

(a) Plea of tender, with a profert in curia of the money on certificate of no money paid, court held it no plea, and plaintiff might sign judgment. *Pether et al. v. Shelton*, 1 *Str.* 638.

action was subsisting was good, that it was otherwise to his clerk, who shewed no authority but his master's order to demand it. *Lord Kenyon, Esp. N. P. 115. Hil. 34 Geo. 3.*

If the plaintiff takes the money out, he may proceed for further damages by joining issue on the general issue pleaded, and confessing the tender in his replication. If plaintiff takes money out of court.

PLEAS IN ABATEMENT.

AND the said C. D. in her own proper person comes and says, that she now is, and before and at the time of exhibiting the bill of the said A. B. was and ever since hath been, covert and married to one C. D. then and still her husband, and living, to wit, at *London* aforesaid, in the parish and ward aforesaid, and this she the said C. D. is ready to verify; wherefore because the said C. D. is not named in the said bill, the said C. D. prays judgment thereof, and that the same may be quashed, &c. Coverture pleaded in abatement to an action by bill.

(a) And C. D. against whom the said *James Lee* hath issued his original writ, by the name of E. D. in his own person comes and says, that he was baptized by the name of C. D. to wit, at *Westminster*, aforesaid, and by the christian name of C. hath always since his baptism hitherto been called and known; without this, that he the said C. D. now is, or at the time of suing forth the said original writ of the said A. B. was or ever before had been called or known by the christian name of E. as by the said writ is above supposed: and this he the said *John Stout* is ready to verify; wherefore he prays judgment of the said writ, and that the same may be quashed, &c. Misnomer pleaded in the christian name to an action by original.
J. M.

The defendant is to file this plea with the clerk of the papers, with the following affidavit annexed: To be filed.

(a) Entitle the plea thus, C. D. sued by the name of E. D. ats. A. B.

In the King's Bench.

A. B.	Plaintiff,
	and
C. D. sued by the name of	
E. D.	Defendant.

Affidavit to be annexed to plea. (a)

(a) C. D. of, &c. the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance, and matter of fact.

Sworn, &c. (b)

C. D.

Before whom to be sworn.

To be sworn before a judge, and engrossed on a 2s. 6d. stamp paper. If the defendant lives in the country, may be sworn before a commissioner in this court.

A plea of misnomer of defendant, beginning, "and the said *Richard*, sued by the name of *Robert*," is bad. 5 *Term Rep.* 487. *Roberts v. Moon*.

May put in bail in a country cause, and plead in abatement, and perfect bail afterwards.

In a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the court. *Dimsdale v. Neilson*, 2 *E.* 406. (c)

In this plea, the surname must be given.

The defendant in a plea in abatement of misnomer, must give his surname as well as his true christian name, although his true surname be used in the declaration. *Haworth v. Spraggs*, 8 *Term Rep.* 515.

If cause of action arise ex contractu.

If the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; but where it arises *ex delicto*, the plaintiff may sue all or any of the parties, upon each of whom individually, a separate trespass attaches: to the former, partners not named may be

(a) If there be no affidavit annexed, the plaintiff may sign judgment. *Carth.* 402 So if not signed by counsel.

These pleas may be pleaded in person or by attorney, *Lutw.* 7. and to be filed with clerk of the papers.

(b) The plaintiff cannot sign judgment after a plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney. *Horsefall v. Mattherwoman*, 3 *Maule and Selw.* 154.

(c) The like in a town cause, though defendant had before put in other bail, and given notice of justifying, but had withdrawn them in time. *Hopkinson v. Henry and another*, 13 *East*, 170.

pleaded in abatement; to the latter, others in partnership and not named, cannot.

GENERAL ISSUE.

THE general issue, or general plea, is what traverses, *General issue.* thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it; as in trespass, either *vi et armis* or on the case, *non culpabilis*, not guilty; in debt, upon contract, *nil debet*, he owes nothing; in debt, on bond, *non est factum*, it is not his deed; or on an *assumpsit*, *non assumpsit*, he made no such promise; or in a real action, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right, the mise or issue is, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue, by which is meant, a fact affirmed on one side, and denied on the other.

No general issue need be signed by counsel, but it is to be engrossed on a 4d. stamp paper, and delivered to the attorney for the plaintiff, or may be entered in the book kept by the clerk of the docquets. Pay 6d. *General issue need not be signed.*

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not undertake or promise, in manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country, &c. *Non assumpsit.*

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said writing obligatory (or indenture) in the said declaration mentioned, is not his deed: and of this he puts himself upon the country, &c. *Non est factum.*

And says that he does not owe to the said A. B. the said sum of 100l. above demanded, or any part thereof, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country, &c. *Nil debet.*

That he doth not owe to our said lord the king, and to the said A. B. who sues as aforesaid, the said sum of 100l. above demanded, or any part thereof, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country, &c. *Same to a qui tam action.*

Cur. Not guilty to an action of debt on 10 *Ann. c. 16.* is not a nullity; and indeed it should rather seem that this is a good plea; for as this is an action for an offence under a penal statute, the defendant by such a plea, says that he is not guilty of the offence. *Coppin qui tam v. Carter*, 1 *T. R.* 462. Upon a devastavit against executors, not guilty may be pleaded as well as *nil debet. Ibid.*

Non assum-
sit testatoris.

That the said E. F. in his life time did not undertake or promise, in manner and form as the said A. B. hath above thereof complained against him: and of this he puts himself upon the country, &c.

Non detinet.

That he doth not detain from the said A. B. the said indenture of lease, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in
trespass.

That he is not guilty of the supposed trespass and assault above laid to his charge, in manner and form as the said A. B. hath thereof above complained against him; and of this he puts himself upon the country, &c.

Not guilty in
trespass and
assault.

That he is not guilty of the supposed trespass and assault above laid to his charge, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in
case.

That he is not guilty of the premises above laid to his charge, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country, &c.

Non assump-
sit and notice
of set-off. To
be ingrossed
on 4d. stamp-
ed paper, and
need not be
signed by
counsel.

And the said C. D. by J. S. his attorney, comes and defends the wrong and injury, when, &c. and says that he did not promise or undertake, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country, &c.

In the King's Bench.

A. B. Plaintiff,
and
C. D. Defendant.

Notice of set-
off for work
and labour
with horses,
&c.

Take notice, that the above defendant will at the trial of this cause give in evidence, and insist, that the plaintiff before and at the time of commencement of this suit, was and still is, indebted unto the said defendant in the sum of 200l. for the use and hire of divers horses, mares, and gelding, (*as the case is*) by him the said defendant, before then let to hire to the said plaintiff, and at his request; and for work and labour before then done

To be deliver-
ed to the

and performed by the said defendant and his servants, and with his horses, carts, waggons, and other carriages for the said plaintiff, and at his like request; and also for money before then paid, laid out, and expended by the defendant for the said plaintiff, and at his like request; and for money by the said defendant before then lent and advanced to the said plaintiff, and at his like request; and for money by the said plaintiff before then had and received to and for the use of the said defendant, and for divers goods, wares, and merchandizes, by the said defendant before then sold and delivered to the said plaintiff, and at his like request; and for money due and owing from the said plaintiff to the said defendant upon an account stated between them; which said sum of 200l. is still due and owing from the said plaintiff to the said defendant, and out of which said sum, he the said defendant will, at the trial of this cause, set off and allow to the said plaintiff so much thereof against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, pursuant to statute in such case made and provided. Dated the day of 1817.

plaintiff's attorney, and if necessary to be proved at the trial, to be produced, and ingrossed on 4d. stamp paper.

If it is a country cause it is usual to get one of the counsel's clerks to deliver it, (who goes the circuit.)

the

Mr. I. K. Plaintiff's
Attorney, (or agent.)

Yours, &c.
J. S. Defendant's
Attorney, (or agent.)

The general issue as above.

In the King's Bench.

Between

{ A. B. Plaintiff,
and
C. D. Defendant.

Take notice, That the above defendant, will at the trial of this cause, give in evidence and insist, that he the said defendant heretofore, to wit, in this present *Trinity* term, in the forty-sixth year of the reign of our lord the now king, in the court of our said lord the king, before the king himself (the said court then and still being holden at *Westminster*, in the county of *Middlesex*) by bill without the writ of our said lord the king, and by the consideration and judgment of the same court, recovered against the above-named plaintiff 41l. 10s. which, in and by the said court, were then and there adjudged to the said defendant, for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings then lately made by the said plaintiff to the said defendant, and whereof he the said plaintiff was

Notice of set-off for money due on a judgment in the K. B.

convicted, as for his costs and charges by him about his suit in that behalf expended, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, to wit, at *Westminster* aforesaid, more fully appears; which said judgment is still in full force and effect, not reversed, satisfied, or otherwise vacated; and that under and by virtue of the said judgment, he the said plaintiff, before and at the time of the commencement of this suit, was, and still is, indebted to the said defendant in a large sum of money, to wit, in the said sum of 41l. 10s. and out of which said sum of money he the said defendant will at the said trial, set off and allow to the said plaintiff, so much thereof against any demand of him the said plaintiff, to be proved at the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. Dated, &c.

Yours, &c.

Mr. I. K.

Plaintiff's attorney
(or agent.)

J. S.

Defendant's attorney, (or agent.)

SPECIAL PLEAS.

Plea of non-assumpsit, and the statute of limitations.

To be filed with the clerk of the papers.

AND the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, That he did not undertake and promise, in manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country, &c. And for further plea in this behalf, the said C. D. by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he saith, that he did not undertake or promise, at any time within six years next before the day of exhibiting the bill of the said A. B. in manner and form as the said A. B. hath above thereof complained against him; and this the said C. D. is ready to verify; wherefore he prays judgment, if the said A. B. ought to have or maintain this aforesaid action thereof against him, &c.

J. M.

Replication, that within six years defendant did undertake, &c.

And the said A. B. as to the said plea of the said C. D. by him secondly above pleaded in bar, says, that he by reason of any thing by the said C. D. in that plea above alleged, ought not to be barred from having or

maintaining his aforesaid action thereof against him, because he says that the said C. D. did within six years next before the day of exhibiting the bill of him the said A. B. to wit, on the day of in the year of our Lord 18 , at *Westminster* aforesaid, undertake and promise, in manner and form as the said A. B. hath above thereof complained against him; and this he prays may be inquired of by the country. And the said A. B. doth the like. Therefore, as well to try this issue, as the said other issue above joined, let a jury thereupon come before our lord the king at *Westminster*, on, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

N. B. This replication the clerk of the papers draws, and there needs no counsel's hand.

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says that the said A. B. ought not to have his aforesaid action thereof maintained against him, because he says, that the said A. B. before and at the time of the exhibiting the bill of the said A. B. against the said C. D. that is to say, on the 1st day of *January* in the year of our Lord 1817, at *Westminster* aforesaid, in the county aforesaid, was and still is indebted to the said C. D. in a large sum of money, (that is to say) in the sum of 100l. of lawful money of *Great Britain*, for so much money by the said C. D. before then lent and advanced to the said A. B. and at his special instance and request; and in the further sum of 100l. of like lawful money, for money before that time paid, laid out, and expended by the said C. D. to and for the use of the said A. B. and at his like instance and request: and in the further sum of 100l. of like lawful money, for money by the said A. B. before that time had and received, to and for the use of the said C. D. And the said C. D. further says, that the said several sums of money so due and owing from the said A. B. to the said C. D. as aforesaid, exceed the damages sustained by the said A. B. by reason of the not performing the said several promises and undertakings of the said C. D. in the said declaration mentioned; and that out of which said several sums of money, he the said C. D. is willing, and hereby offers to set off and allow to the said A. B. the full amount of the said damages, according to the form of the statute, &c.; and this the said C. D. is ready to verify; Wherefore he prays judgment, if the said A. B. ought to have his aforesaid action thereof maintained against him, &c.

Plea of set-off for money lent, laid out, and had and received.

J. M.

And the said A. B. says, That he, by reason of any

Replication thereto.

Need not be signed.

thing by the said C. D. above in pleading alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because he says, that he the said A. B. was not, nor is indebted to the said C. D. in manner and form as the said C. D. hath in his said plea in that behalf above alleged; and this he the said A. B. prays may be inquired of by the country; and the said C. D. doth the like, &c. Therefore let a jury thereupon come, &c.

Plea of satisfaction in assumpsit.

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he says, that after the making of the several promises and undertakings in the said declaration mentioned, to wit, on the second day of *Feb.* in the year of our Lord 1817, at *London* aforesaid, in the parish and ward aforesaid, the said C. D. delivered to the said A. B. one hogshead of sugar, in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money thereupon due, owing, or accrued; and which said hogshead of sugar the said A. B. then and there accepted and received of and from the said C. D. in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money as aforesaid; and this he the said C. D. is ready to verify; wherefore he prays judgment, if the said A. B. ought to have or maintain his aforesaid action thereof against him, &c.

S. M.

Replication hereto.

Need not be signed.

And the said A. B. says, That he, by reason of any thing by the said C. D. in his aforesaid plea above alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because protesting that the said C. D. did not deliver to him the said A. B. the said hogshead of sugar in the said plea mentioned, in full satisfaction or discharge of the said several promises and undertakings in the said declaration mentioned, or of any or either of them, or of all or any part of the damages or sums thereupon due, owing or accrued, in manner and form as the said C. D. hath above in his said plea in that behalf alleged; for replication in this behalf, the said A. B. says, that he did not accept or receive the said hogshead of sugar of or from the said C. D. in full satisfaction or discharge of the said several promises and undertakings in the said declaration mentioned, or of any

or either of them, or of all or any part of such damages or sums of money as aforesaid, in manner and form as the said A. B. hath above in his said plea in that behalf alleged; and this he the said A. B. prays may be inquired of by the country; and the said C. D. doth the like, &c. Therefore, &c.

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and as to the said several promises and undertakings in the said declaration mentioned, except as to 4l. and 4s. parcel of the said several sums of money in the said declaration also mentioned, says, that he did not undertake and promise, in manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country. And as to 4l. and 4s. parcel of the said several sums of money in the said declaration mentioned, the said C. D. says that the said A. B. ought not to have or maintain his aforesaid action in this behalf against him the said C. D. to recover any more or greater damages than the said 4l. and 4s. in this behalf, because he says, That he the said C. D. from the time of making the said several promises and undertakings in the said declaration mentioned as to the said 4l. and 4s. always hithertowas and still is, ready to pay to the said A. B. the said sum of 4l. 4s. and that he the said C. D. before the exhibiting of the bill of the said J. to wit, on the 22d day of Feb. in the said year of our Lord 1817, at, &c. in the said county, tendered and offered to pay to the said A. B. the said 4l. and 4s.; which said 4l. and 4s. the said A. B. then and there wholly refused to receive from the said C. D. and the said C. D. now brings the said 4l. 4s. here into court, ready to be paid to the said A. B. if he the said A. B. will accept the same; and this he is ready to verify; wherefore he prays judgment, if the said A. B. ought to have or maintain his aforesaid action thereof against him to recover any more or greater damages than the said 4l. and 4s. in this behalf, &c. S. M.

Non assumpsit to part, and a tender to the residue.

The day may be stated under a scilicet.

And the said A. B. as to the said plea of the said C. D. by him above pleaded, as to the said 4l. and 4s. parcel of the said several sums of money in the said declaration mentioned, says, That he, by reason of any thing by the said C. D. in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him to recover his full damages in this behalf; because he says, that the said C. D. did not tender or offer to pay to the said A. B. the said 4l. and 4s.

Replication denying the tender.

in manner and form as the said C. D. hath above in pleading alleged; and this he prays may be inquired of by the country, and the said C. D. doth the like. Therefore, &c.

If the plaintiff accepts the money, and goes for further damages.

Join issue as to the *non assumpsit*, and at the end of the plea of tender, say, and hereupon the said plaintiff freely takes and accepts out of court here the said 4l. and 4s. so tendered and paid into court as aforesaid; therefore, as to the said 4l. and 4s. the said plaintiff is satisfied; and as to the trial of the issue above joined between the parties aforesaid, let a jury thereupon come before our lord the king at *Westminster*, on

Need not be signed.

next after by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place.

N. B. This issue is made up by the clerk of the papers.

Plea of infancy. To be signed by counsel.

Because he says, that he the said defendant at the time of the making the said several promises and undertakings in the said declaration mentioned, was under the age of 21 years, to wit, of the age of 18 years, and no more, to wit, at *London*, aforesaid, &c. and this he is ready to verify; wherefore, &c.

B. L.

Plea of judgment recovered in C. P. in *assumpsit*.

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he says, that heretofore, to wit, in *Hilary* term in the 57th year of the reign of his present majesty, the said A. B. impleaded the said C. D. in his said majesty's court, before Sir *Vicary Gibbs*, Knight, and his companions, then his majesty's justices of the Bench, at *Westminster* in the county of *Middlesex*, in a certain plea of trespass on the case, on promises, to the damage of the said A. B. of 60l. on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had in the said court of the Bench aforesaid in that plea; that afterwards, to wit, in that very same *Hilary* term, in the 57th year aforesaid, the said A. B. by the consideration and judgment of the said court, recovered against the said C. D. in that plea 60l. for his damages which he had sustained, on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and whereof the said C. D. was convicted, as by the record, and proceedings thereof, remaining in the said court of the

Bench aforesaid, at *Westminster* aforesaid, more fully appears; which said judgment still remains in its full force, strength, and effect, not in the least reversed, set aside, paid off, annulled, satisfied, or discharged; and this he is ready to verify by the said record; wherefore he prays judgment, if the said A. B. ought to have or maintain his aforesaid action thereof against him, &c.

S. M. (a)

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said A. B. ought not to have his aforesaid action thereof maintained against them, because he says, that the said A. B. heretofore, to wit, in term, in the year of the reign of his present majesty, impleaded the said C. D. in his majesty's court before Sir *Vicary Gibbs*, Knight, and his companions, then his majesty's justices of the Bench, at *Westminster* in the county of *Middlesex*, in a certain plea of debt, for 80*l.* of and upon the said identical writing obligatory is the said declaration mentioned; and such proceedings were thereupon had, in the said court of the Bench aforesaid, in that plea, that the said A. B. afterwards, to wit, in that same term, in the year aforesaid, by the consideration and judgment of that court, recovered in the said plea, against the said C. D. his debt aforesaid, and also 5*l.* which in the said court of the said Bench aforesaid, were adjudged to him, for his damages which he had sustained, on occasion of the detaining of the said debt, whereof the said C. D. was convicted, as by the record, and proceedings thereof, still remaining in the said court of the Bench aforesaid, at *Westminster* aforesaid, more fully appears, which said judgment still remains in its full force, strength and effect, not in the least reversed, set aside, paid off, satisfied or discharged; and this he the said C. D. is ready to verify, by the said record: whereof they pray judgment, if the said A. B. ought to have his aforesaid action thereof maintained against them, &c.

S. M. (b)

(a) The clerk of the papers draws the replication, and rejoinder, which completes the paper book.

(b) Where a sham plea was pleaded of a judgment recovered in the court of pie poudre in Bartholomew, Fair in terms palpably fictitious, the court reprobated the

OF MOVING TO ABIDE BY PLEA.

How to proceed.

If the defendant plead a special plea, as a judgment recovered in another court for the same cause, or such a plea as you think he will not abide by, you may move the court for him *to stand by such plea, or plead such other instant* as he will stand by, the latter is done by *motion in court*; if to plead on the morrow, then by a *counsel's* hand being signed; take the latter to the clerk of the rules, (the former is handed up in court,) in either case he draws up the rule, pay him 7s., counsel 10s. 6d.; make copy and leave it with the defendant's attorney, or at his house.

When to plead.

When the court doth order one to plead *forthwith*, he shall plead in such convenient time after as the court shall judge reasonable; but if it be *instant*, then he must plead the *same day*, 2 *Lill. P. R.* 372. It is now settled to be within 24 hours after rule served. *Price v. Hodgson*, *E. T.* 35 *Geo.* 3.

Vacation time.

A judge at his chamber, in vacation time, may make an order, that the defendant shall plead such a plea as he will stand by. 2 *Burr.* 781. *Foster v. Shaw*.

In case of a dilatory plea or frivolous demurrer, the court will order defendant to stand by it, or plead *instant*.

If it be towards the end of the term (that the plaintiff may have sufficient time to give notice of trial,) the court will order the defendant, if he will not abide by his plea, to plead another *instantly*, provided always that the time allowed by the common rule to plead be expired: and the practice is the same with regard to frivolous demurrers. *N. on Rule*, *T.* 5 & 6 *Geo.* 2. 2 *Salk.* 515.

If he plead a new plea, it can only be the general issue, and a *set-off*.

If a plea has been pleaded, and the plaintiff obtains a rule or order of a judge, that he plead such other as the defendant will abide by, the defendant may either stand by the plea pleaded, or plead such other within the time limited by such rule or order, but he can only plead the general issue and a notice of *set-off* after such rule or order. *Hare v. Lloyd*, 1 *Term Rep.* 693. *Cochran v. Robertson*. *S. P.*

practice, and suffered plaintiff to sign judgment, and ordered the attorney to pay all costs. *Blewitt v. Marsden*, 10 *East*, 237.

The costs of this motion are allowed, whether the defendant plead a-new or not. I have this from the master. Costs.

If the defendant *abides* by his plea, and takes *no notice* of the rule served, the plaintiff must then proceed to reply, and not sign judgment. *Webb v. Holt*, 2 Str. 1234. If he abides by plea.

Of striking out special Plea, waiving and adding Pleas.

When the paper book is delivered to defendant's attorney, he may, (unless he has pleaded a new plea,) within the time limited by the rule for the return, strike out the special plea, and plead the general issue; or, if the defendant demur specially, and the book be made up, he may, within the time, strike that out, and plead the general issue. 2 Salk. 514. When he may strike out plea.

The defendant cannot *waive the general issue*, and instead thereof give a *special plea or demurrer*, nor can he *waive a general demurrer*, and give a *special demurrer or special plea*. N. on R. T. 5 & 6 Geo. 2. 2 Str. 960. *Law v. Law*. But if a special plea or *special demurrer* be given in, and the book is made up, and delivered to the defendant's attorney, he may strike out the *special plea or demurrer*, and return it with the *general issue, or general demurrer*. *Ibid*. And though he is tied down by a rule of court, or an order to plead issuably, and take short notice of trial, and the plaintiff replies, yet he may demur to the replication, if there is *good cause*, without breach of the rule or order, but not otherwise. *Str.* 1185. *Dewey v. Sopp*. Cannot waive the general issue or general demurrer, But if special he may.

But if the *general issue* be plead by *mistake*, the court, on affidavit of facts, will permit defendant to withdraw it, and plead a justification. 1 Wils. 254. So in C. P. *Barn*. 346. 2 Wils. 204. If general issue be plead by mistake.

If the *general issue* be pleaded by mistake, *without a notice of set-off*, the court will give leave to withdraw such plea, and order it to be delivered again with the notice of set-off. 2 Str. 1267. *Blackburn v. Matthias*. If without notice of set-off.

Leave has been given to add a plea after issue joined, though two terms have elapsed. 1 Wils. 223. *Waters v. Bovell*. A plea may with leave be added.

It seems there have been many instances of leave being given to *withdraw* plea pleaded, and replead with a justification, where the court can prevent the plaintiff If plea be withdrawn.

from suffering any inconvenience by it, as by obliging the defendant to take short notice of trial, and in case there be a verdict for the plaintiff to let him have judgment of the term. *Per Cur. Taylor v. Joddrell*, 1 *Wils.* 254.

Stat. of gaming.

Leave was given to withdraw *non est factum*, and to plead the statute of gaming, the attorney conceiving the statute might be given in evidence on the *non est factum*. *Jeffereys v. Walker*, 1 *Wills.* 177.

General issue waived and allowed to plead double.

Nil debet pleaded, and after demurrer, leave was given to withdraw it, and plead it again with a *special plea*. *Meard v. Phillips*, 2 *Str.* 906.

Plea waived after joinder in demurrer.

Nil debet pleaded to a bond for performance of covenants after joinder in demurrer, on defendant's consenting to put plaintiff in same condition as if he had pleaded right at first, court permitted him to waive his plea, and plead performance of covenants. *Herbert v. Griffiths*, 2 *Str.* 1181.

Replication permitted to be withdrawn after six terms.

A replication was permitted to be withdrawn, and leave given to reply *de novo* after six terms elapsed; the case was, that the plaintiff had (by mistake of former attorney) traversed a lease under which he himself claimed. *Alder v. Chip*, 2 *Burr.* 755. This was considered as an amendment to prevent the defacing and obliterating the roll.

After voluntary nonsuit.

But court refused, after a voluntary nonsuit, to give plaintiff leave to reply *de novo*, that a latitat issued within six years. *Hutchinson v. Price*, 5 *Burr.* 2692.

For more, see title *Amendment*.

REPLICATION.

How to compel Plaintiff to reply, &c.

No time fixed for replying, &c.

THERE is no time fixed upon for replying to the plea, &c. the party who is to do the act applies to the master for a special rule for that purpose, and if the plaintiff does not file his replication, &c. within the time limited, which is *four days exclusive after the service of the rule*, judgment of *nonpros* may be signed *without a demand made* of such replication, &c. as the *service of the rule* is deemed a demand of itself.

If defendant neglect.

If the defendant on the other hand neglect to rejoin or

rebut, when served with the rule, the plaintiff may sign his judgment on the expiration of the rule.

So if plaintiff does not surrejoin or surrebut within the time limited, the defendant may sign judgment of *non-pros.* So if plaintiff neglect.

Sunday, on which day the court doth not sit, if it be not the last of those four days, is to be reckoned a day within those rules. Sunday, &c.

To compel the party to *reply*, &c. get a rule from the master entered on the back of your last proceeding, viz. *plea, replication*, &c. take same to the clerk of the rules, whose clerk *enters* it and marks same, *entered*, pay 3s. then serve copy on plaintiff's attorney, naming the cause, thus: "*Doe v. Roe, Saturday, next after, &c. to reply, entered.*" If the replication, &c. is not filed or delivered, as the case happens (if special, at the clerk of the papers, if to a general plea, to the attorney,) then when rule is expired, *sign judgment of nonpros*; for which see title *Nonpros.* To compel plaintiff to reply.

If a cause has continued *four terms* without prosecution before issue joined, each party shall have a term's notice to reply, rejoin, &c. unless the cause hath been staid by injunction or privilege; and such notice must be given before the *essoign day*. 2 Str. 1164. If four terms elapsed.

And such notice should be, *that you intend to proceed, after the end of the ensuing term, by giving a rule to reply*: in this case the rule is to be given by the master the day after the term is expired, and to be entered with the clerk of the rules, *before service*. Notice after the end of the ensuing term.

Rule to reply, rejoin, &c. may be given at any time in term time, or within *sixteen days* after the term. When rule may be given.

A replication was, by leave of the court, withdrawn six terms after filed. 2 Burr. 756. *Alder v. Chip.* Withdrawing replication.

If you want time to reply, &c. you may have a summons for that purpose. Time.

Proceed in the same way to urge defendant to rejoin, plaintiff to surrejoin, and so on, until issue be joined. Rejoin.

If defendant does not rejoin, the plaintiff may strike out the previous pleadings, and enter judgment as for want of a plea; for it is considered as an abandonment of the plea. *Petrie v. Fitzroy*, 5 Term Rep. 152. If defendant does not rejoin.

The case of *Thomson v. Rial*, 4 Term Rep. 195. stated in *Sell*. 369. is on a *paper book*, and not on a *Four days exclusive.*

rule to reply.—The four days to reply, &c. is *four days exclusive*, and judgment cannot be signed till the afternoon of the fifth day after the rule served; as if served on the sixth, judgment cannot be signed till the 11th, in the afternoon.

PAPER BOOKS.

Definition.

PAPER Books are the issues in law upon *special pleadings*, made up by the clerk of the papers, who is an officer appointed by the court for that purpose. And such clerk, in all copies of pleas and paper books by him made up, shall subscribe to such paper books *the names of counsel* who have *signed such plea*, as well on the behalf of the plaintiff, as of the defendant; and that in all books to be delivered to the justices of this court, the names of the *counsel* who shall sign those pleadings, as well on the part of the plaintiff, as on the part of the defendant, shall be written under those books by the clerks or attornies who shall deliver those books. R. E. 18 C. 2.

When the issue shall be said to be joined.

In case of special pleading, the book must be delivered to the defendant's attorney, and if returned, then, and not before, the issue upon the pleadings is joined; for then both parties are agreed on the determination of the matter in question. *Vide 2 Lill. Pract. Reg. 113.*

In what cases the attornies may make up the issue, *vide title Issue.*

Paper days.

Tuesdays and *Fridays* are called special paper days because the court goes into the paper, before they enter upon motions.

In what cases paper book may be made up, without giving a rule to rejoin.

In all special pleadings where the plaintiff takes issue upon the defendant's pleading, or traverseth the same, or demurs, so as the defendant is not let in to allege any new matter, there the plaintiff may make up the paper book without giving a rule with the secondary to rejoin, otherwise a rule must be given. (a) N. on Rule *Trin. 1 Geo. 2.*

As to costs, if defendant does not re-

Where the clerk of the papers made up the book on

(a) Unless the defendant be bound, by a judge's order, to rejoin *gratis*.

a replication to plea of set-off, and which was delivered to defendant's attorney, who did *not return* same.—The plaintiff afterwards gave notice of trial, made up the record, and countermanded same.—The master disallowed the costs of the record and briefs, as also the notice of trial, and said, plaintiff should have signed his judgment for want of the paper book being returned.—But had the plaintiff joined the issue on defendant's rejoinder, he might then have gone to trial, if he thought proper, instead of signing the judgment, and would have been allowed the costs.

turn book, and plaintiff does not sign judgment.

How to proceed to make up the Book.

If a special plea be left in the office, that is, such a one as plaintiff can take issue on, make a copy of the declaration on unstamped paper, and carry it to the clerk of the papers, *Symond's Inn*, who will, if the replication be of course, draw same, and make up the paper book forthwith; and give this rule thereon, "unless the defendant receive this paper book, and returns the same on (naming the day) to be enrolled, let a writ be made," which is *four days* exclusive of the day you deliver it; pay him 8d. *per* sheet for the whole book, and 4d. *per* sheet for all the pleadings subsequent to the declaration, besides stamps, which book keep a copy of, and deliver to defendant's attorney; *if issue be joined*, the plaintiff may give notice of trial on the back of the book, when he delivers the same. In case the defendant's attorney does not return it in time, (no payment for the pleadings is requisite,) sign judgment the same as if no plea had been delivered, and execute an inquiry; the same notice which was given for the trial shall serve for the inquiry; but give notice that such inquiry is to be executed on such a day, at such an hour and place: as for instance, "at the sheriff's office, &c." If he return the paper book, then proceed to trial as in other cases.

How to make up paper book, if the action be in case.

Payment for the book to clerk of the papers.

Rule, M. 36 Geo. 3.

The defendant did not pay for the paper book; on a plea of *non assumpsit* and tender, plaintiff signed judgment.—Motion to set it aside. *Lord Kenyon*. We have had a conference with the judges of the C. P. and they all agree with us in thinking that the rule (*Hilary term*, 35 Geo. 3.) established here, and which has been adopted in that court, *ought to be general*. Rule absolute.

Judgment cannot be signed for non-payment for paper book.

Fuller v. Osborne, 6 Term Rep. 477. *Vide* for rule title *Issue*.

How to proceed on a Plea of Judgment recovered, in the Common Pleas.

How to proceed on a plea of a judgment recovered in case, in another court.

If it be not an issue on which you can go to trial, *viz.* an issue on a replication of *nul tiel record*, to a plea of a judgment recovered, and the defendant returns the book without striking out any of the pleadings, get the master to give on the paper book "a rule to produce the record," which is a four day rule, enter it with the clerk of the rules, pay 3s. a copy of which is served on defendant's attorney; this done, enter all the proceedings on the roll exactly as they are in the paper book: first *entering the term*, then *warrants of attorney for plaintiff and defendant*, docket the same, carry it to the treasury chamber, and file it; on the day mentioned in the rule for defendant to produce the record, go to *Westminster*, bespeak the roll at the treasury to be brought into court, and give paper book to one of the criers, who will call defendant three times "to produce the record or he will be condemned." Pay in the whole 4s. 6d. The master marks on the side of the roll "the defendant hath not produced the record," which is signing the judgment, give notice of inquiry, and proceed to execution. But if it be in debt, a rule must be given for judgment, which expires in four days exclusive, sign judgment on a 10s. stamp paper^a, bespeak the roll of Mr. *Edge*, to be brought to the master's, he will tax the costs and mark them on the roll, pay 3s. 6d. then sue out execution.

If in debt.

^a The master will do this at Westminster in term.

This marking of the roll is in fact signing the judgment; but it is the practice for the clerk of the judgments to enter the judgment. Make an *incipitur* on a 4d. stamp paper, which take to the clerk of the judgments. If this is omitted, it is irregular, in as much as there is no judgment to warrant the further proceedings, pay 6d. for entering same. In debt, a four-day rule must be given for judgment, and afterwards judgment is signed on 10s. stamp.

How to proceed on the Return of the Book, and Demurrer filed.

How to proceed if defen-

If defendant returns the paper book, and indorses thereon "*that he has struck out the rejoinder*," which (he

may do,) "*and left a demurrer in the office,*" take paper book to the clerk of the papers to have the demurrer and joinder added thereto, deliver the book again to the attorney (which is now called the demurrer book,) and he must return the same in "twenty-four hours, after delivery," or sign judgment, which is done as if no plea had been pleaded. But if he return the book in time, (a) (no payment is necessary,) then enter on the roll the term, warrants of attorney, and the memorandum as far as the cause of action; take it to the clerk of the judgments, he will enter it, then give a brief to counsel, with instructions to move for a *consilium*, (that is,) a day appointed to argue the demurrer, which is signed only, pay 10s. 6d. take the roll to the clerk of the papers, who will mark it "read," pay 1s. 6d. and he will sign his initials on counsel's brief; go to the clerk of the rules, give him the brief, and he will draw up the rule, pay him 6s. 6d. then return to the clerk of the papers, and he will set down the cause, pay 1s. Serve copy of rule on defendant's attorney. Then plaintiff's attorney proceeds to make two copies of the demurrer book for the chief justice and senior judge, and the defendant's attorney (may if he pleases, and which he usually does, *if for argument*,) makes two copies for the *two other* judges, (no stamps are requisite,) on brief paper. The rule of Easter term, 2 Jac. 2, is to be attended to; the exceptions which shall be insisted upon in argument, shall be marked in the margin of the books delivered; and also the rule as to the delivery to the judges of Trin. 40 Geo. 3. Those for argument on Tuesday, to be delivered on Saturday preceding.—Those for Friday, to be delivered on Tuesday preceding. In case the defendant's attorney neglect to deliver his books in time, then the plaintiff's attorney may deliver them for him; pay the clerks 2s. each. If the defendant's attorney neglects to deliver his before then, the plaintiff's attorney delivers the *two* for him; and in this case *the defendant cannot be heard*. If there is an argument, a copy is to be made for counsel, fee discretionary on each side; but if no argument, then the plaintiff's attorney having delivered the *four books* to the judges,

dant returns the paper book, and demurs to the replication.

On setting cause down for argument, the term and No. of the roll to be produced to the clerk of the papers, to shew you have made the entry at the judgment office.

(a) The rule of M. 36 Geo. 3. extends to all special issues, and the paper and demurrer books made up thereon. 6 T. R. 477. And see 1 Bos. & P. 292. S. P.

Draw up rule
for judgment.

delivers a copy also to his counsel, with a fee of one guinea *indorsed thereon, to move for judgment*, naming the day appointed for hearing, and informing him that the defendant has delivered no books; or by putting on the brief,—*No argument*. On the day appointed attend the court, and pay the criers four shillings. In the evening go to the clerk of the rules, draw up the rule for judgment, pay 6s. 6d. and if the action be in case, then give notice of executing a writ of inquiry, and proceed therein as under title *Judgment by Default*. (a)

If in debt.

If the action be in debt, then stamp the rule for judgment with a 10s. stamp, and proceed to tax the costs, first bespeak the roll from the treasury, *if carried in*, to be at the master's; if not, enter all the proceedings thereon yourself, and the master will mark the roll; pay 3s. 6d. then take out execution. No rule for judgment is given after argument on demurrer in debt, for the court will not suffer any one to tell them that the judgment they gave on mature deliberation is wrong. But otherwise in case of judgment by default, *Str. 425. Edwards v. Blunt*.

Notes respecting Paper Books.

Where plaintiff tenders an issue on defendant's plea, and notice of trial given, if defendant demurs and judgment given, it shall serve for inquiry.

Notice of trial given for the special issue shall (if waived) serve for notice of general issue.

Where the plaintiff, upon any pleading of the defendant, tenders an issue, and the paper book is made up and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, the same notice which was given for the trial of the issue on the paper book, shall serve for executing the writ of inquiry, but then the plaintiff ought to give notice of the hour and place of executing the inquiry. *N. on R. H. 8 Geo. 1.*

Upon the delivery of any paper book, wherein an issue is joined, and notice of trial given on the back of the book, if the same be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of the general issue. *N. on Rule, Hil. 8 Geo. 1.*

(a) Being a judgment given by the court, the roll is supposed to be marked in court "judgment for the plaintiff" by the master, therefore there is no necessity to sign an interlocutory judgment.

If a paper book be made up and delivered in term time, or *within four days exclusive after the term*, with a rule given thereon, by the said clerk of the papers, for bringing the same book to be enrolled, and defendant's attorney doth not, *within four days after the delivery thereof*, bring back the book, and join with the plaintiff in the special issue or demurrer made up, or waive his special plea, and give the general issue or demurrer to any special issue tendered, judgment may be signed and entered, as if no plea had been pleaded. *N. on R. Trin. 1 Geo. 2.*

When to return the paper book if it be made up and delivered in term, or in four days after.

It seems by the course of the office, the paper book in a cause in *London* or *Middlesex* cannot be made up with the usual four day rule to return it, *unless the same be made up and taken from the office within four days from the end of the term.* (a) But I take it, if the defendant is under terms of taking short notice of trial for the adjournment day, and he delay filing his plea, he is bound to return the book, so that the plaintiff may go to trial according to the terms of the order, although the rule be contrary, as he is bound to rejoin *gratis*, by the order, and he must redeliver the book in twenty-four hours, notwithstanding the rule for the plaintiff to make up his record.

In town causes.

The course of the office respecting making up the paper book in country causes is, that the book may be made up with the usual rule to return same at any time previous to the assizes.

Country causes.

And if it be an issue to be tried at such assizes, the defendant's attorney shall deliver it back within four days after the delivery, and join in the special issue, or give the general issue, and take notice of trial, or else the plaintiff's attorney may sign judgment by default, as if the defendant had not pleaded. But in all cases, if the plaintiff's attorney accept the book after the limited time, he cannot sign judgment. *N. on R. T. 1 Geo. 2.*

At the assizes.

The case of *Oxley v. Bridge* created much confusion in the practice, by the court's determining, that defendant had until the office opened to return the book, although the rule expired the preceding evening, by which the defendant got the term of the plaintiff. *Dougl. 67.* But

On a rule to return the book, within four days, if the defendant delay till the morning of the fifth day, the plaintiff may sign judgment.

(a) It is said the clerk of the papers has no discretion to give a rule to return the paper book in less than four days, even though the defendant be under terms of taking short notice of trial. *Hale v. Smallwood, E. 35 Geo. 3. Tidd, 6 Ed. 774.*

in *Trin. term* 1779, it became the object of a second inquiry, and the case was this: action on bond, plea, judgment recovered. Replication, *nul tiel record*, the book was delivered with the usual four day rule. The book was not offered to be returned till the morning of the fifth day before the opening of the office, when the plaintiff refused to receive it, and immediately signed judgment and took out execution. Rule to set the proceedings aside for irregularity. The master certified, that strictly the plaintiff was entitled to sign judgment, if the paper book was not returned on the evening of the fourth day, although it is a very common indulgence to allow him till the next morning. Lord *Mansfield* was clear, that a judgment entered up agreeably to what the master had certified to be, in strictness, the practice of the court, could not be set aside for irregularity. *Rule discharged. Haseler v. Ansel, Dougl. Rep.* 197.

Same doctrine. The rule expired *Saturday*, paper book not returned till the *Monday* morning before the opening of the office, when plaintiff refused to receive it, and immediately signed judgment: court held the judgment regular. *Thomson v. Ryal, 4 Term Rep.* 195.

Book not delivered same night obtained from clerk of the papers.

The book very often is not delivered the same night the clerk of the papers delivers it out; in that case, the defendant has four days after delivery to deliver it back, viz. one day inclusive, the other exclusive: as if delivered the sixth, it must be redelivered the tenth, unless the defendant be upon terms under a judge's order.

Where the plaintiff concludes *ad patriam*, and defendant demurs, he shall accept notice of inquiry.

That in every case where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper book, and thereupon the defendant to hinder the trial of the issue shall demur in law upon the replication or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment, the attorney for the defendant shall be obliged to accept of notice of executing a writ of inquiry of damages from the time of notice of trial given upon the paper book as aforesaid. *R. Hil. 8 Geo. 1.*

Rule to be four days exclusive.

It is said in *N. on R. Trin. 1 Geo. 2.* if the paper book be of an issue in fact, the four days for keeping the book are accounted exclusive; if a demurrer or issue in law, the four days are inclusive; but there is no such distinction; four days exclusive of the one day, and including the other, in both cases.

- By accepting the paper book or returning it, the defendant admits it to be properly made up, 2 *Str.* 1151, 1266. 3 *Burr.* 1682. Therefore if there be a variance before the return of it, a summons may be taken out to set it right, as he cannot otherwise take advantage of the irregularity, or a motion in arrest of judgment as for a new trial.
- By accepting the book, or returning, admits same to be properly made up.

DEMURRER.

DEMURRER, in law, is a kind of pause or stop put to the proceeding of any action upon some difficult point which must be determined by the court, before any further progress can be had in it. In every action, the controversy is either as to fact, or as to law; the first decided by the jury; the second, by the judges. If the plaintiff's declaration be not sufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to it; if on the other hand the defendant's plea be invalid, the plaintiff may demur in law to the plea, and so on in every other part of the proceeding, and to try the issue, the other party joins in demurrer. For this purpose a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on record on a roll of the term it is joined, and copies thereof, called demurrer books, are delivered to the judges. Definition.

By stat. 27 *El.* c. 5. after demurrer joined in any action or suit, in any court of record, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer. For these causes there must be a special demurrer.

No advantage or exception shall be taken of or for an immaterial traverse, the default of entering pledges upon any bill or declaration, the default of alledging the profert in curia of any bond, bill, indenture, or other deed mentioned in the declaration or other pleading, or of letters testamentary, or letters of administration, the omission of *vi et armis* or *contra pacem*, the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or not alledging *prout patet per recordum*; but the So for these.

court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer, so as sufficient matter appear in the pleadings upon which the court may give judgment according to the very right of the cause, though it might have been substance before the stat. of queen *Eliz.* 4 *Ann.* c. 16.

If demurrer be for defect in substance.

Since these statutes, the party on a general demurrer may take advantage of defects in substance, and therefore if the defects be not clearly of that nature it is safest to demur specially; in which case, he may not only take advantage of such defects, but also of any others that are specially set down.

General or special demurrer.

A demurrer, is either general or special; general, where no particular cause is alledged; special, when the particular object is pointed out, and insisted upon as the cause of demurrer; and that as a general demurrer confesses all such matters of fact as are sufficiently pleaded, *Hob.* 233. so he that demurs specially, can take no advantage of any other matter of form than what is expressed therein; but he may of any other matter of substance. *Co. Litt.* 72. 10 *Co.* 88. (a)

Three counts, if one be good, judgment.

If there be three counts to the declaration, to which there is a general demurrer, if any one of the counts be good, judgment must be for the plaintiff, if such count can be joined with the other two. *The Duke of Bedford v. Alcock*, 1 *Wils.* 252.

If plea or replication be bad in part, &c.

But if a plea or replication, which is entire, be bad in part, it is bad for the whole. 1 *T. R.* 40. 3 *T. R.* 374. 1 *Salk.* 312.

When cannot demur to declaration.

Defendant cannot demur to a declaration, because it says he was summoned, instead of attached, without prayingoyer. *Rep. temp. Hard.* 189.

Rule as to proceeding to Argument, &c.

The plaintiff to deliver books to the chief and senior justice,

Ordered, that in all matters of law, special verdicts, and *writs of error* upon matters in law or special verdicts, and

(a) A general as well as special demurrer, is to be signed by counsel, or plaintiff may sign judgment.

likewise in all other causes depending in court entered, or to be entered in the book of the clerk of the papers, where books ought to be delivered to the judges, that according to the ancient course of the court, immediately after the reading of the record, books ought to be delivered to the chief justice and senior justice by the plaintiff, or his attorney, and to the other justices by the defendant, or his attorney; and if one party, or his attorney, shall neglect to deliver the books in form aforesaid, then the other party, or his attorney, ought to deliver such books omitted, at the cost of the party who shall so neglect, before any argument in that cause shall be made at bar by counsel. *R. Mich. 17 Car. 1.* This rule, so far as respects writs of error, is discharged by *R. E. 33 Car. 2.*

and the defendant to the other judges, if one neglects, the other to do it for him.

Tuesdays and *Fridays* are special paper days, because the court go into the paper before they enter into motions. Paper days.

In the case of *Forbes v. Lord Middleton, 2 Str. 1242.* the court held, that the rule for the *concilium* not having been served, or any notice given of putting the cause in the paper, was not an irregularity, for it was the duty of the defendant to search, since he must expect the plaintiff would proceed, and refused to set aside the judgment obtained. But I have asked the master, who says, that the rule ought to be served where there is a real demurrer. And see rule, *Mich. 30 Geo. 2.* to this effect. Formerly it was determined that the rule for concilium need not be served, but now it is otherwise.

Whereas, a rule was made in *Easter* term in the second year of the reign of king *James* the second, whereby it was ordered, that upon reading any record here in court, upon a demurrer in law, special verdict, or writ of error, and thereupon a day is given to hear the counsel for both parties, the book shall be delivered to the justices of this court, by the attornies of both parties, by the space of four days, before the day so by the court appointed. And that the exception, which shall be insisted on, upon the argument shall be marked in the margin of those books. It is hereby ordered, that the said rule be henceforth strictly observed, by the attornies of both parties, who are required to deliver the said paper books. *R. Hil. 30 Geo. 3.* Books shall be delivered to the judges upon arguing demurrers, special verdicts, and writs of error.

Exceptions to be marked in the margin.

The exception should be marked by the party who delivers in the margin of the books he delivers, and he should leave a copy of such exceptions with the two judges to whom he does not deliver books. *1 Smith Rep. 361. per Lawrence, J.* By whom the exceptions are to be marked.

When they shall be delivered.

Ordered, that paper books in causes entered with the clerk of the papers in this court for argument on *Tuesdays*, shall be delivered to all the judges on the *Saturday* next preceding the day; and that those entered for argument on *Fridays*, be delivered on *Tuesday* next preceding the same, with such marginal notes as are directed by the rule, *Hil. 38 Geo. 3. R. T. 40 Geo. 3.*

The explanation of the rule, *Hil. 38 Geo. 3.*

The rule *Hil. 38 Geo. 3.* respecting the exceptions to be marked in the margin, is meant for the assistance of, and to draw the attention of the judges to the point in question, and prevent them unnecessary trouble.

Causes for argument, when to be entered and argued, and notice given on the other side.

(a) *Ordered*, that all special causes to be set down by the clerk of the papers, shall be entered at least four days exclusive of the day of argument; of which notice shall forthwith be given to the attorney or agent on the other side; and to be argued in the order the same stand entered; and shall not be adjourned, unless the court for reasonable cause, verified by affidavit, upon application to be made by either of the said parties, their attorney or agent, at least two days before the day of argument otherwise order; that all such causes remaining undetermined at the end of any term, shall, without any new entry, be continued in the books kept by the clerk of the papers, to come on the next term in the order and course the same stand. *R. M. 30 Geo. 2.*

On a general demurrer, the plaintiff's attorney may make up book.

If there be a general demurrer to the declaration, the plaintiff may apply to a judge for a summons for leave to amend; if not, he may proceed to join in demurrer, and make up the demurrer book himself, a copy of which he is to deliver to defendant's attorney.

Cannot waive general issue, and give special plea.

The defendant cannot waive the general issue, and instead thereof give a special plea or demurrer, nor waive a general demurrer and give a special demurrer or special plea. But if a special plea or special demurrer be given in, and the book is made up and delivered to the defendant's attorney, he may strike out the special plea

(a) The *concilium, dies concilii*, or day to hear the counsel of both parties, was formerly moved for upon reading the record in court, but now it is a hand motion. *2 Lill. 421.* And signing a *concilium* is considered as a step in the cause, so as to make it unnecessary to give a term's notice. *3 Term Rep. 530. Bland v. Darley.*

or demurrer, and return it with the general issue or general demurrer. *N. on R. T. 5 & 6 Geo. 2.*

The defendant obtained time to plead, pleading issuable, and taking short notice of trial. The plaintiff demurred to the replication, and plaintiff made up the record, and tried the cause before demurrer heard. Cur. said, on motion to set aside the verdict, the construction of the terms put upon the defendants, when they ask time to plead, is not to oblige them in all events to join issue to the country, but only where the replication offers a fair issue, and affords no reasonable cause for demurrer; now here the replication not shewing any tender of a surrender, does give such a colour of objection as will warrant what the defendant hath done. *Dewey v. Sopp, Str. 1185.*

The defendant is not bound by a consent to rejoin gratis, if the replication affords cause of demurrer.

Non assumpsit to three counts, demurrer to the 4th, after judgment on the demurrer, plaintiff takes out a writ of inquiry and executes it. This was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted that the plaintiff ought to take out a venire, *tam* to try the issue, *quam* to inquire of the damages upon the demurrer. *Sed per curiam*, that is indeed the course where the issues are carried down to trial before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the cause to *nisi prius*: and as to the want of a *nolle prosequi* upon the roll, he may supply that when he comes to enter the final judgment; if not you will have the advantage of it upon a writ of error. The judgment on inquiry must stand. *Fleming v. Langton, 1 Str. 532. 574.*

Where there are issues in fact, and in law, the plaintiff may waive the issue, and take out an inquiry upon the demurrer.

After judgment for the defendant on demurrer to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas, on which issues were joined. 10 *East, 366. Parton and others v. Sir Home Popham and another.*

How to proceed to Argument.

If there be a general demurrer to the declaration, the plaintiff's attorney if he wishes to have it argued makes up the demurrer book, if the cause be by bill, with a memorandum of the term in which he joins in demur.

On general demurrer.

rer,(a) and copies the whole declaration as delivered, the demurrer, adding thereto a joinder in demurrer, which is to be ingrossed on 4d. stamp paper and delivered to the defendant's attorney. Then get a roll, enter thereon the warrants of attorney for the plaintiff and defendant, and a copy of the whole demurrer book as delivered, and of that term in which it is so delivered; take the same to the clerk of the docquets, and enter the pleadings with him and docquet the roll; when he has marked the roll, make out brief to counsel "to move for a concilium;" pay 10s. 6d. then take the same to counsel to sign, which is now a hand motion. Counsel having signed the motion paper, take the roll and motion paper to the clerk of the papers, who will mark the roll, "read," and signs the initials of his name on the back of the motion paper, then take same to the clerk of the rules, who will draw up the rule for hearing of counsel for both parties, which is a four day rule; pay 6s. 6d. then return to the clerk of the papers, and upon your production of the rule, he will enter the cause for argument, pay him 1s.; serve a copy of the rule on the defendant's attorney, (which is necessary.) (b)

If to be argued.

If the demurrer is to be argued, make two copies of the demurrer book on brief paper (unstamped) one for the chief justice, the other for the senior judge, with the exceptions in the margin intended to be insisted upon in argument; deliver the same as mentioned in the rule *Tris.* 40 *Geo.* 3. p. 338. The defendant's attorney at the same time, if he means that the demurrer should be argued, makes also two copies, for the two other judges (enter the exceptions in the margin) and deliver the same, pay each of the clerks 2s. on delivery of the books.

There must be also another copy of the book made on brief paper, for counsel on each side to argue.

If defendant's attorney neglects delivering the books.

But if the defendant's attorney shall neglect to deliver his books to the judges in time, then plaintiff's attorney may make the two other copies, and deliver them for him;

(a) If by original, no memorandum, but a copy of a declaration, &c.

(b) In 2 *Stra.* 1242. *Forbes v. Ld. Middleton*, it was held to be unnecessary to serve a copy of the rule on the defendant's attorney, as he ought to search. I have always understood the practice to be otherwise.

and if he neglects to pay for them before the argument, according to the rule, *M. 17 Car. 2.* he is not to be heard. Therefore of course, judgment will go against him.

The fee to counsel where there is an argument is discretionary. If there be no argument, the fee is one guinea. On the day of argument, attend at *Westminster* and pay the criers 4s. In the evening go to the clerk of the rules, who will draw up the rule "*that judgment be entered for plaintiff*;" pay 6s. This being a judgment given by the court in actions on the case, trespass, and the like, there is no occasion to sign an interlocutory judgment, as the roll is supposed to be marked by the master in court, therefore you may now give notice of executing a writ of inquiry, and proceed therein as under title *Judgment by Default*. But if the action be upon a note of hand, or bill of exchange, you move to refer it to the master to see what is due for principal, interest, and costs, and proceed as under title *Inquiry*.

Fees to counsel.

On day of argument.

If action be upon note of hand or bill of exchange.

Plaintiff's attorney must draw up a rule for judgment at the clerk of the rules, and then sign judgment on a 4d. stamp, and on a 10s. stamp, if in debt.

Judgment on demurrer in case or debt.

If the stamp office be shut, you may enter an incipitur on a 10s. stamp paper, and take it to the clerk of the judgments who will on producing the rule, sign the judgment; which take to the master, annexing the rule thereto, and have the roll as before, he will tax the costs, and mark the same on the roll, and judgment paper.

If the stamp office be shut.

But if you have not carried in the roll, then enter all the proceedings thereon to the end of the joinder, and produce same to the master, who will tax the costs as before.

If roll not carried in.

Michaelmas term, in the 57th year of the reign of King George the Third.

London, (to wit.) Be it remembered that on *Thursday* next after the morrow of All Souls in this same term, before our lord the king at *Westminster*, comes A. B. by J. T. his attorney, and brings into the court of our said lord the king before the king himself, now here, his certain bill against C. D. being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *London*, (*sc.*) (to the end of the declaration,) suit, &c.

A general demurrer book, by bill.

And the said C. by J. T. his attorney, comes and defends the wrong and injury, when, &c. and saith, that

General demurrer to declaration.

the said declaration, and the matters therein contained, are not sufficient in law for the said A. to have or maintain his said action against the said C. to which said declaration the said C. hath no need, nor is he obliged by the law of the land to answer: wherefore, for want of a sufficient declaration in this behalf, the said C. prays judgment, and that the said A. may be barred from having and maintaining his aforesaid action thereof against him, &c.

S. M.

Joinder.

And the said A. says, that the declaration aforesaid, and the matters therein contained, are sufficient in law for the said A. to have his aforesaid action thereof maintained against the said C. which said declaration, and the matters therein contained, the said A. is ready to verify, and prove as the court shall award; and because the said C. hath not answered the said declaration, nor in any wise denied the same, the said A. prays judgment, and his damages by occasion thereof, to be adjudged to him, &c. but because the court of our said lord the king now here, is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the said parties, that they be before the lord the king at *Westminster*, on next after , to hear their judgment thereon, for that the court of our said lord the king now here, is not yet advised thereof, &c. (a)

No occasion to fill this up.

Demurrer to a plea.

And the said A. as to the said plea of the said C. by him above pleaded, says, that the plea aforesaid, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law for the said C. to bar the said A. from having or maintaining his aforesaid action thereof against him the said C. and that the said A. is not under any necessity, nor is he bound by the law of the land in any manner to answer thereto, and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said A. prays judgment, and his damages by reason of the premises to be adjudged to him, &c.

J. B.

Demurrer to the replication.

And the said C. as to the said plea of the said A. by him above in reply pleaded to the said plea of the said

(a) The book is not to be paid for; the rule *Hil. 35 Geo. 3.* extends to special issues, paper books, and demurrer books. *6 Term Rep. 477. Fuller v. Osborn.*

C. and the matters therein contained, are not sufficient in law for the said A. to have or maintain his aforesaid action thereof against him the said C. and that he the said C. is not under any necessity, nor is he bound by the law of the land in any manner to answer the same, and this he the said C. is ready to verify; wherefore, as before, he prays judgment, and that the said A. may be barred from having and maintaining his aforesaid action thereof against him, &c. And for causes of demurrer in law, according to the form of the statute in that case made and provided, the said C. sets down and shews to the court here the following causes, to wit, (here set forth the causes.) The cause must be expressed in what particular. *Hob. 232.*

Leave has been given after argument on demurrer, to amend the declaration, where the declaration was demurred to. *Luxton v. Robinson, Dougl. 620.*

Amendment after demurrer argued.

Leave was given to defendant, after argument, to withdraw the demurrer, and take issue on the replication. *Howell v. Mac-Ivers, 4 Term Rep. 690.* So, after argument and before judgment pronounced, may have leave to amend. *Str. 954.*

Withdraw demurrer. 2 Wils. 174. S. P.

If there is a demurrer to the plea, in which the point has not been settled, but which the court determines to be good, they will permit plaintiff to withdraw the demurrer, and to reply. *Collins v. Collins, 2 Burr. 820.*

Withdrawing demurrer.

A plea may be bad on a general demurrer, though it might be helped after verdict, as *nil debet* to an action on bond. 2 Wils. 10. *Anon.*

Plea.

Where there are several issues in law, and in fact, the determination of the issue in law may be either before or after the trial of the other, at the option of the plaintiff, 2 Saund. 300. (3). In practice, it is advisable to determine the issue in law first, being more expeditious and less expensive. If the issue in law go to the whole cause of action, and it is determined in favour of the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact. Whereas if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue in law; and if that be found against him, he will not be allowed his costs of the trial of the issue in fact. *Ibid.*

Where there are several issues in law, and in fact, the best way is to try the issue in law first.

And if the demurrer go to the whole, or part of the cause of action, if the plaintiff proceed to argue it first, and the court are of opinion against him, he may amend

as at common law; but after the cause has been tried, he cannot amend farther than is allowable by the statutes of amendments.

In the case of *Sir F. Burdett v. Colman*, and same *v. Earl of Moira*, 13 *East*, 27, there were issues in fact and in law, and the court on motion postponed the trial of the issues in fact, until after the argument on demurrer.

Leave to amend before trial of the issues, not after.

Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; but not after the verdict found on the issues upon facts, and contingent damages found upon the demurrers, of which there never was an instance. *Mr. J. Denison, Robinson v. Rayley*, 1 *Burr.* 322.

How to make up Demurrer Book on a Special Demurrer.

Deliver a copy of the declaration to the clerk of the papers on unstamped paper, who makes up the paper book, and gives a four day rule in the margin, to receive and return the book.

If defendant's attorney returns the book in time, then enter the proceedings on the roll. (See *PAPER BOOK*, title *How to proceed on the Return of the Book, and Demurrer filed.*)

When Demurrer Book may be made up by the Defendant.

When the defendant's attorney may enter the plaintiff's demurrer upon record.

It is ordered, that if any plaintiff here in court shall demur in law to any plea, rejoinder or rebutter, by any defendant here in court exhibited, and such defendant joins in such demurrer in law; that then the attorney for the plaintiff shall enter of record such demurrer in law, and in default thereof, upon a rule given by the secondary of this court, for entering of such demurrer in law, the attorney for the defendant shall enter of record such demurrer. R. E. 11 W. 3.

If plaintiff demurs or takes issue on plea, rejoinder, &c. and defendant joins, how to proceed.

If the plaintiff demurs or takes issue on the defendant's plea, rejoinder, or rebutter, and the defendant joins therein, and the plaintiff will not make up the book and enter it on record (having made a default) then the defendant may, pursuant to this rule, make up the book and enter it; and when he has made up same, deliver it to the plaintiff's attorney, because the plaintiff may perhaps enter the issue, as he has a right to do, at any time before the expiration of the above-mentioned rule given by the secondary, which rule ought to be served on the plaintiff

at the same time the book is delivered to him. If the plaintiff does not enter the issue, the defendant may, at the expiration of the rule, and give notice of trial by proviso. N. on the above rule.

N. B. By the above rule, the book cannot be made up by the defendant until default made by the plaintiff; then make up the paper book, apply to the master for a rule, which he gives on the book or on a separate piece of paper, that "*unless the plaintiff enters the issue on record on next after let the same be entered on the part of the defendant.*" Enter it at the clerk of the rules, pay 3s. serve copy at the time you deliver the book.

Defendant cannot make up book till after default.

If the plaintiff refuses to join in demurrer, get a rule from the master on the back of the demurrer, enter it with the clerk of the rules, pay 3s. serve copy on plaintiff's attorney, and if he does not deliver it, if it be a general demurrer, or file it, if to a special demurrer, at the expiration of a rule, sign a nonpros.

If plaintiff refuse to join in demurrer.

OF THE TRIAL BY RECORD.

To an action on the judgment brought in the same court, and the defendant pleads nul tiel record, and the plaintiff replies, that *there is such a record*, on which a day is given to produce the record, the plaintiff's attorney will bespeak the roll if docketed to be brought into court that day, if not he will get the roll completely docketed and filed, and have it ready in court that day to produce, which he may do, by applying to Mr. Edge, the clerk of the treasury, for that purpose, who will bring the roll into court, pay him 4s. 6d. You will give Mr. Edge the draft of the issue for the master to mark "that the plaintiff hath produced the record." In the evening give a rule for judgment, which state to be, on an issue of nul tiel record, pay 3s. and after the expiration being four court days exclusive (*Sunday is no day*) sign judgment, tax the costs, and take out execution.

If a plea of nul tiel record be pleaded to an action on the judgment brought in same court, how to proceed.

Where a judgment, or other matter of record in the same court is pleaded, and the plaintiff replies nul tiel record, the party pleading, must on demand give a note in writing of the term and number roll whereon such judgment or matter of record is entered and filed; or in default thereof, the plea is not to be received. N. on Rule 5 and 6 Geo. 2. See *Carth. Rep.* 453, 517. for motion that the plea may be rejected, see 2 *Stra.* 823. *S. P. Hunter v. Wiseman.*

Where a judgment, &c. in same court is pleaded.

If action be brought in this court, on judgment in C. P.

If an action be brought in this court, on a judgment recovered in the Common Pleas, and the defendant pleads *nul tiel record*, there must be a certiorari issue from this court, to the court of Common Pleas, to certify the record. 2 Burr. 1304. *Hewson v. Brown*.

Inferior court.

So if debt be brought on a judgment in an inferior court and the like plea, a certiorari must issue to the proper officer of that court to certify. Bro. V. M. 244. If it be on a recovery in a county palatine there shall be a writ to the chamberlain to certify. *Clift's En.* 148.

County palatine.

ISSUE.

Of making up the Issue.

N. on R. T.
12 W. 3.

EVERY clerk or attorney of the King's Bench may, according to the ancient rules of the court, make up the issue and demurrer books in the following cases, viz. Every issue that may be given on the book side—*Not guilty to a new assignment in trespass, the bar of son frank tenement, comperuit ad diem, to a bail-bond, nul tiel record* to an action of debt on a judgment, a general demurrer to a declaration, in covenant where the defendant in his bar concludeth to the country; every special non est factum; every son assault demesne; and likewise all issues and demurrers upon every writ of error, scire facias, and audita querela, and repleaders, or other matters formerly entered of record. In all other cases, both by bill and original, the issue, or as it is commonly termed, the paper book, or upon an issue in law, the demurrer book, is made up by the clerk of the papers. Say. Rep. 97.

Issue to be ingrossed on stamp.

In all cases where the issue is made up by the attorney, it is to be ingrossed on a four-penny stamp paper on one side only, and delivered to the defendant's attorney,

By rule, no money is to be paid for issue paper book, &c.

And by rule, H. 35 Geo. 3. it is ordered that no judgment shall be signed for non-payment of the issue money, but that the issue money shall remain to be taxed, as part of the costs in the cause: which rule has been held to extend not only to general issues but to all special issues, paper books, and demurrer books. Fuller v. Osborn, 6 Term Rep. 477.

What the issue is to contain.

The issue contains an entry of the declaration, plea, and all subsequent pleadings, and in actions by bill should be made up of the term in which the *similiter* is joined.

And it is prefaced with a memorandum, stating the term in which the declaration is delivered, and that there are pledges for the prosecution of it.

In case the issue be made up the term the declaration is of, it states the bill to have been exhibited on the first day of that term. If made up the term declaration of.

But if the issue is to be made up of a subsequent term to that in which the declaration is delivered, then the memorandum states the bill to have been exhibited of the term generally as last past, in which the declaration is delivered, to which is added an imparlance over to the term the issue is made up. If of a subsequent term.

Where the proceedings are entered with a general memorandum, which relates to the first day of term, and the cause of action appears in evidence to have arisen after the first day of term, the plaintiff may produce the writ, in order to shew that it was really sued out, subsequent to the cause of action. 3 Burr. 1241. *Morris v. Pugh and another.* See 2 Str. 1271. If proceedings are entered with a general memorandum.

In actions by original, the issue is intituled of the term the issue is joined, and has no memorandum. In actions by original issue.

Of making up the issue on a general plea of *non assumpsit*; or not guilty, &c. where the declaration and plea are of the same term.

Michaelmas term, in the 57th year of the reign of King George the third. *Law and Markham.*

London, } Be it remembered, that on Thursday
to wit. } next after the morrow of All Souls in
this same term, before our lord the king at *Westminster*
comes A. B. by E. F. his attorney, and brings into the
court of our said lord the king, before the king himself
now here, his certain bill against C. D. being in the
custody of the marshal of the *Marshalsea* of our lord
the now king, before the king himself, of a plea of trespass
on the case, (a) and there are pledges for the prosecution,
to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *London, (ss.)*
John Denn complains (to the end of the declaration) omitting
the pledges, and proceed on a new line, as (follows.) The form of an issue by bill of the same term with the declaration.

And the said C. D. by G. H. his attorney, comes and defends the wrong and injury, when, &c. and says, that As the action is. If in debt (say so) trespass and assault trespasses. Plea.

(a) The last day of the term, if your cause is tried the sittings after: if in term, the first day of the term. If in the country, the last day of term.

he did not undertake or promise in manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country; and the said A. B. doth the like, &c. Therefore, let a jury thereupon come before our lord the king at *Westminster*, on (a) next after by whom, &c. and who neither, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place. (b)

If issue mislaid.

If plaintiff delivers the issue to defendant, and the papers are afterwards mislaid, the court will order the defendant to give him a copy of the issue to enter it by. *Wiar v. Smith*, *Str.* 414.

If declaration be stated on a particular day in term.

If the declaration be stated, of a particular day of the term, the memorandum to the issue must state *the same day*, which is generally the day after the cause of action arose. And where a tender is pleaded, and plaintiff puts a general memorandum of the term, the defendant may apply by summons to have the memorandum altered to the right day. (c) 1 *Str.* 638. *Smith v. Key*. 1 *Ld. Ray.* 683. *Carth.* 354.

Issue may be amended after verdict.

Issue may be amended after verdict, although the *similiter* was not joined by adding it. *Cowp.* 408. *Sayer v. Pocock*. Formerly held not amendable *Str.* 641. 8 *Mod.* 376.

How to make up Issue where the Declaration and Plea are of different Terms.

— term, (the term in which issue is joined) in the 57th year of the reign of king George the third. *Law and Markham.*

Middlesex, } *Be it remembered*, that in *Trinity*
to wit } term (d) last past, before our lord
the king at *Westminster*, came A. B. by E. F. his at-

(a) The last day of the term, if your cause is tried the sittings after: if in term, the first day of the term. If in the country, the last day of term.

(b) If the pleadings are special, they should be copied in their proper beginning, each with a new line.

(c) The reason for a memorandum is, that proceedings by bill were formerly considered as the by business of the court. *Gilb. C. P.* 47.

(d) The term the declaration is of, and if the issue be

torney, and brought into the court of our said lord the king, before the king himself, then there, his certain bill against C. D. being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case, upon promises, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, (to the end of the declaration,) omitting pledges, and proceed on a new line, as follows:)

And now at this day, (that is to say,) on *Thursday* Imparlance. next after the morrow of All Souls in this same term, (b) until which day the said C. D. had leave to imparl to the said bill, and then to answer the same, &c. at which day before our said lord the king at *Westminster*, come as well the said A. B. by his said attorney aforesaid, as the said C. D. by G. H. his attorney; and the said C. D. defends the wrong and injury, when, &c. and says, that he did not undertake and promise in manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country, and the said A. B. doth the like, &c. therefore let a jury thereupon come, &c. (as in the other.)

Enter only one imparlance, if the plea be of two or three terms subsequent to the declaration; as for instance, declaration of *Hilary* term, 52 *Geo. 3.* plea of *Easter*, and you try the cause of *Trinity*, imparl over to the first day of *Trinity*, and make up your issue as of that term, as the *want of a continuance day cannot be assigned for error in this case. Vide stat. of Jeof. 32 H. 8. c. 30. 4 & 5 Ann. c. 16.*

If plea of two or three terms subsequent to declaration.

Where there are two or more issues taken upon the defendant's plea, then after the tender of the last issue, "and of this he puts himself upon the country, and the said plaintiff doth the like," add this, "Therefore as well to try this issue as the said other issue above joined, let a jury thereupon come before our lord the king at

Award of venire where there are two or more issues.

made up more than four terms after the declaration, instead of the words "last past," say "in the year of the reign of our lord the now king."

(b) The first return of the term in which the issue is made up.

" *Westminster*, on next after by whom,
 "&c. and who neither, &c. to recognize, &c. because as
 "well, &c. the same day is given to the parties afore-
 "said, at the same place."

Too late to
 object to plea
 roll after de-
 fendant has
 paid for issue.

After trial, in arrest of judgment, it was objected, that the plea roll contained only the declaration, and the plea of *nil debet*; whereas, there was a plea in abatement which had been demurred to, and a *respondeas ouster* awarded, no judgment upon it was entered on the roll before *nil debet* pleaded; court held this irregularity cured by the defendant's accepting the issue and paying for it. His objection ought to have been made at that time; it is too late to make it now. Rule discharged. *Combe v. Pitt*, 3 *Burr.* 1683.

Record agrees
 with declara-
 tion variance
 from issue no
 material.

Declaration stated bond 6th Jan. 1728, plea *non est factum*; in the issue, bond stated 1738, issue received and paid for. Record 1728, no defence—Verdict. Motion to set it aside as varying from the issue delivered; court refused, saying defendant's plea was not altered by it, the issue being whether he executed a bond in 1728. Besides, he should have refused the issue, if not agreeable to declaration. *Shepley v. March*, 2 *Str.* 1131.

Issue against
 two defen-
 dants, where
 one pleads and
 the other lets
 judgment go
 by default.

To the end of the defendant's plea, then join issue, and the said A. B. doth the like: then go on thus: and the said E. F. in his proper person comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains therein undefended against the said E. F. for which the said A. B. ought to recover his damages by occasion of the premises; but because it is unknown to the court here, what damages the said A. B. hath sustained by means thereof; and because it is also at present unknown to the court here, whether the said C. D. will be convicted of the premises upon which the above issue is joined, between the said A. B. and the said C. D. or not; and because it is necessary and convenient that there be but one taxation of damages in this suit; therefore, let the giving of judgment in this behalf against the said E. F. be stayed, until the said issue between the said A. B. and C. D. be determined; and as well to try the issue above joined between the said A. B. and C. D. as to inquire against the said E. F. what damages the said A. B. hath sustained in this behalf, let a jury thereupon

Unica taxatio.

come before our said lord the king at *Westminster*,
on next after by whom,
&c. and who neither, &c. because as well, &c. the same
day is given to the said A. B. and C. D. at the same
place.

In this case the defendant who lets judgment go by
default, must have notice of trial of the issue and assess-
ment of the damages, which may be thus: "Take
"notice, that the issue joined in this cause between the
"above-named plaintiff, and the above-named C. D. will
"be tried at the next assizes, to be holden at W. in and
"for the county of W. and that at the same time the da-
"mages will be assessed by the same jury against you in
"this cause upon the judgment taken by default. Dated,
"&c."

The notice of
trial where
one pleads,
and the other
lets judgment
go by default.

Therefore as well to try this issue as the said other
issue (or issues) above joined between the said A. B. and
the said E. F. let a jury thereupon come, &c.

Award of
venire where
there are several
defendants
who plead se-
parately.

Where the venue is laid in a county palatine, instead
of the common award of a *venire facias*, there is a special
award of a *mittimus* to the justices there, commanding
them to issue the jury process, and when the cause is
tried, to send the record back again to the court above,
and the award of the *venire* and *mittimus* are in the fol-
lowing form:

Where the
venue is laid
in a county
palatine, as
Lancaster.

Therefore let a jury be made thereof: And because the
said issue above joined between the parties aforesaid,
ought to be tried by men of the county palatine of *Lan-*
caster, that is to say, of the body of the said county, where
the writ of our said lord the king doth not run, and not
elsewhere; therefore to try the said issue above joined
between the parties aforesaid, let the record of the
plaint aforesaid be sent to his majesty's justices of the
said county palatine of *Lancaster*, so that the same
justices, by his said majesty's writ of that county,
to be duly made out, and to the sheriff of the
same county directed, do command the same sheriff,
that he cause twelve good and lawful men, of the
body of the said county of *Lancaster*, to come before
the said justices, at their next general sessions of as-
size to be holden for the said county, after the said re-
cord shall be delivered to them, each of whom, &c. by
whom, &c. and who neither, &c. to recognize, &c. because
as well, &c. and when the verification and issue aforesaid
shall be there made and tried, then the said justices shall
send the record of the plaint aforesaid, together with

The award of
mittimus to
the county
palatine of
Lancaster.

every thing that shall be done thereupon before them, in his said majesty's court there, to our said lord the king at *Westminster*, at a certain day, which the said justices shall appoint to the said parties to be in the same court here, to hear judgment thereupon.

Award of
mittimus to
the city of
Chester.

Therefore let a jury be made thereof: And because the men of the said city of *Chester* and county of the same city ought not, nor have been used to come out of the same city, to try any issue joined in the same city; therefore for the trying the issue aforesaid triable in the said city of *Chester*, and county of the same city, let the record of the plaint aforesaid be sent to the chamberlain of our said lord the king of his county palatine of *Chester*, or to his deputy there, so that the said chamberlain or his deputy, by writ of our said lord the king under the seal of the said county palatine, duly to be made out, do cause the record aforesaid to be sent to the mayor of the said city of *Chester*, and county of the same city, commanding the said mayor, that for trying the issue aforesaid, the said mayor do command the sheriffs of the said city of *Chester*, and county of the same city, that they cause to come before the said mayor, at a certain day and place by the said mayor to be appointed, after the said record shall have been delivered to him twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. And when the verification and issue aforesaid shall have been there made and tried, then the said mayor shall send the record of the plaint aforesaid, together with every thing that shall have been done therefore before him, to the said chamberlain or his deputy, so that the said chamberlain or his deputy may remit the same into the court of our said lord the king, before the king himself at *Westminster*, at a certain day which the said mayor shall appoint to the said parties to be in the same court here, to hear judgment thereupon, &c.

The like to
the county pa-
latine of *Dur-*
ham.

Therefore let a jury be made thereof: And because the issue above between the parties aforesaid, ought to be tried by men of the county palatine of *Durham*, that is to say, of the body of the said county palatine, where the writ of our said lord the king doth not run, and not elsewhere; therefore to try the said issue above joined between the parties aforesaid, let the record of the plaint aforesaid be sent in charge to the bishop of *Durham* that he may further give in charge the said record unto his said majesty's justices within that liberty, so that the same

Justices may have it at his said majesty's next court to be holden at *Durham* within the said county: after the said record shall have been delivered to them there, to cause the verification of the issue aforesaid, to be made as the law shall direct in this behalf; and a day is given then and there to the said parties. And when the verification and issue aforesaid shall have been there made and tried, that then the said bishop shall send the record of the plaint aforesaid together with every thing that shall be done thereupon in his majesty's court there to our said lord the king at *Westminster*, at a certain day which the said justices shall appoint the said parties to be in the same court there to hear judgment thereupon.

But because it is suggested and proved, and manifestly appears to the court here, that the said issue above joined between the parties aforesaid cannot be fairly and impartially tried by a jury of the said town and county of the town of _____, therefore let a jury of the county of _____, being the county next adjoining to the said town and county of the town of _____ thereupon come, &c. (or if by original, it is commanded, &c.)

Suggestion for a trial in an adjoining county.

If it is a *Welch* issue, to be tried in the next *English* county, the award of the venire is thus :

Welsh issue, if to be tried in next English county.

And because the issue aforesaid, between the parties above joined, ought to be tried by men of the next *English* county to the said county of *Carmarthen*, and not elsewhere; and because the county of *Hereford* is the next *English* county to the said county of *Carmarthen*; (a) therefore let a jury of the said county of *Hereford*, &c. thereupon come before our lord the king at *Westminster*, on _____ next after _____ who neither, &c. as in the others.)

When a fair and impartial, or at least a satisfactory trial, cannot be had in the county where the action is laid, the court must be moved, on an affidavit of circumstances, for leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in the next adjoining county. And as the suggestion in that case is not traversable, the court will see that it is necessary,

If a satisfactory trial cannot be had in county where action laid, how to proceed.

(a) Herefordshire is the next adjoining *English* county to *South Wales* for the trial of issues arising there. *Goodright on the dem. of Richards v. Williams*, 2 *Maule and Selw.* 270.

before they give leave to enter it. 3 *Burr.* 1333. *Res v. Harris*. The cause in that case must be tried in the next adjoining county, though it be a county palatine. 7 *T. R.* 735.

If venue be laid in any county of any city or town corporate, the court may direct the issue to be tried by a jury of the county next adjoining.

By stat. 38 *Geo.* 3. c. 52. s. 1. in every action whether transitory or local prosecuted in any court of record at *Westminster*, if the venue in such action be laid in the county of any city or town corporate in *England*, the court may, at the prayer of plaintiff or defendant, direct the issues joined in such action to be tried by a jury of the county next adjoining to the county of such city or town corporate, and award proper writs of *venire* and *distringas* accordingly, if the court shall think proper.

Exception.

The cities of *London* and *Westminster*, *Bristol* and *Chester*, and the borough of *Southwark*, are excepted out of this statute. s. 10.

When venue laid in a place where *venire* does not run.

When the action is laid in a place where the king's writ of *venire* does not run, as in *Wales*, or *Berwick upon Tweed*, &c. 2 *Burr.* 855. 2 *Black. R.* 1036. it is awarded to the sheriff of the next *English* county, upon a suggestion that the issue ought to be tried there. See 10 *Mod.* 198. 1 *Str.* 235.

And if one or more plaintiffs or defendants die.

And where there are several plaintiffs or defendants in a personal action, and one dies before issue joined, his death should be suggested in making up the issue; but otherwise it need not be suggested, till the judgment roll is made up. 1 *Burr.* 363.

The venue remains.

In this method of entering a suggestion upon the roll, the *venue* remains, and the court only award the *venire* to the next adjoining county. 3 *Burr.* 1334.

Award of *venire* where the venue is laid in *Berwick upon Tweed*.

And because the borough of *Berwick* is a place where the king's writ of *venire facias* to summons a jury to try the said issue, doth not run; and because the burgesses of the said borough, by reason of their privileges ought not to be put upon any jury to try the said issue, out of the said borough, but the said issue ought to be tried by a jury of the county of *Northumberland*, which is the next adjoining county to the said borough of *Berwick*; which allegations of the said C. are not denied by the said D.; therefore let a jury of the said county of *Northumberland*, thereupon come before our lord the king at *Westminster*, on next after twelve, &c. by whom, &c. and who are neither, &c.

If the sheriffs are parties to the suit, enter to the end of the *similiter*, then say: and because it is suggested, to the court of our lord the king, now here, that the said A. B. and C. D. are sheriffs of the city of *London*, it is therefore commanded to the coroner of the said city of *London* that he cause to come before our lord the king at *Westminster*, on next after twelve, &c. N. B. The *venire* and *distringas* are directed to and returned by the coroner, pay him 4s. 4d. if common; if special, 8s. 8d.

Issue where sheriffs are parties.

If one sheriff be party to the suit, then say: and hereupon the said A. B. says, that the said E. F. is one of the sheriffs of the city of *London*; and for that reason the said A. B. prays the writ of our lord the king to be directed, to G. H. esq. the other sheriff of the said city of *London*, to cause to come before our lord the king at *Westminster*, on next after twelve, &c. to try the said issue above joined between the said parties: and because the said E. F. doth not deny the said allegation of the said A. B. but admits the same to be true, it is granted to him, &c. It is therefore commanded to the said R. H., the said other sheriff of the said city of *London*, that he cause to come, (as in the former.)

If only one of the sheriffs is party, then it may be directed to the other.

If the coroner as well as the sheriff is a party, or interested, the *venire* and *distringas* are to be directed to elisors, *Barnes*, 465; and after they are appointed, a special jury may be moved for. I should think if sheriff and coroner be interested only, or of kin to either of the parties, this must appear to the court by affidavit; and motion on affidavit is to be made; but if the sheriff is party to the suit, the *venire* is awarded to the coroner as a matter of course for the suggestion. *Vide Cromp. 242. See Tidd, Forms, 4 Ed. 285.*

If coroner and sheriff be party.

How to compel the Entry of the Issue.

If the plaintiff's attorney delays to enter the issue, get a rule from the master, on the back of the issue delivered, take it to the clerk of the rules, who will enter it, pay 3s. serve plaintiff's attorney with a copy, naming the cause thus: *Denn v. Fenn, Friday next after, &c.* to enter the issue. *Entered.* This is a four day rule, therefore the plaintiff must enter the issue on the roll, pay for the entries, and docket the same and deliver the roll to Mr. *Edge*, who will file it in the treasury,

(within four days after the rule served) and such issue must be entered *the term* in which the issue is joined.

Judgment of *non pros*, for entering the issue, cannot be signed, unless there be a rule to enter the issue of the same term in which the judgment is signed. *Lancaster v. Frazer*, 1 *Maule and Selw.* 478.

The issue must be entered the term the similiter is added.

A rule to reply was given in *Easter* term, when plaintiff replied the similiter. In *Trinity* term following, a rule was given to enter the issue, the plaintiff did enter it, but he entered it of *Hilary*, instead of *Easter*, and defendant signed judgment of *nonpros* for not entering the issue; which the court held to be regular; it should have been entered of *Easter*. *Wood v. Miller*, 3 *East*, 204.

If time wanted.

But if plaintiff wants time, he may apply to a judge for a summons, who will grant him a reasonable time to enter the issue.

Cannot give a rule same term issue is joined to enter issue, unless, &c.

If the action be laid in *London* or *Middlesex*, defendant ought not to give a rule to enter the issue the same term the issue is joined, unless notice of trial hath been given; (and I think unless plaintiff hath neglected to proceed to the trial in consequence of that notice;) and, in a country cause, plaintiff is no ways bound to enter his issue the same term; therefore you cannot have a rule for that purpose until the next term. *N. on R. M. 4 Ann.*

Must enter the issue within the time allowed by the rule.

The plaintiff must enter his issue if the action be laid in *London* or *Middlesex*, and bring the record into the office within four days after notice of the rule; or a *nonpros* may be signed.

If roll be brought in any time before judgment, it will do.

But if defendant does not sign the *nonpros*, the plaintiff may bring in his roll at any time before judgment is actually signed, as in case of a plea; for although he has searched after rule expired, he is bound again to make the second search, before he signs his judgment of *nonpros*. *Minns v. Baster*, 2 *Term Rep.* 16.

When defendant may sign judgment.

If a rule be given in *Mich.* term, and the plaintiff does not enter the issue, and the attorney for the defendant does not sign his *nonpros* in that term, the defendant may in *Hilary* term sign his judgment without giving a new rule, provided the plaintiff has not entered the issue. A new rule not necessary.

No record to be sealed before issue entered.

It is ordered, that no record of *nisi prius* shall be sealed or passed at the *nisi prius* office by the *custos*

brevium of this court, or any clerk of that office, before the issue in that cause be fairly entered on record, or an *incipitur* thereof, and such entry, with the record of *nisi prius*, be first brought to and signed by the secondary of this court, for which no fee shall be demanded or paid, but the usual and accustomed fee due to the chief clerk of this court for entry of such issue on record. *R. M. 5 Ann.*

For the entry of the issue, vide *Docket*.

NOTICE OF TRIAL.

It is ordered that due notice be given to the defendant upon all trials at every assizes, when any cause shall be carried to trial, as well in old causes as in new causes; and likewise to the plaintiff in all causes to be tried by proviso, as well in *London* or *Middlesex*, as at the assizes. *R. M. 1651.*

So in all causes to be tried in *London* or *Middlesex*, previous to the sittings.

All notices of trial, or of executing inquiry and countermands, ought to be in writing.

A notice of trial cannot be given on a *Sunday*.

And a notice of trial must be given notwithstanding a special day is appointed for the trial by rule of court. 1 *Black. 798. Ellis v. Trusler.*

If notice of trial be given for the first sitting, and the cause is not set down; new notice must be given as at first, unless the plaintiff's attorney gives notice of continuance two days previous to the trial for any other sitting. If not, a new notice must be given of eight days, as before in the first instance. But if he sets down the cause, and it is made a *remanet*, then no further notice is necessary, as both parties are to take notice, and attend till the cause be tried.

A notice of trial must be given in writing to the defendant's attorney and not to the defendant himself; but if his attorney be not known, then it may be given to the defendant. *Sayer's Rep. 133. Harding v. Stafford.* And it is the duty of the attorney to acquaint his client of having received it, otherwise he may be answerable, in case a verdict goes against him without defence. See *Barn. 37.*

Due notice of trial to be given in all causes.

To be in writing.

Cannot be given on Sunday.

Although a special day be appointed, notice must be given.

If notice be given for first sitting, and cause not set down.

To whom the notice is to be given.

Attorney to acquaint his client.

When new notice requisite.

And if the plaintiff gives notice of trial and does not proceed, he cannot try the cause without first giving new notice, unless by consent, or rule of court, *R. M.* 1654. s. 18.

How given.

It is usually given on the back of the issue, or paper book; or it may be given on a separate paper. In the former case, it need not be so particular as the latter; and therefore when the issue was indorsed as follows; "take notice of trial at the next assizes," it was held sufficient. 2 *Str.* 1237. *Henbury v. Rose.*

In town causes when eight days notice.

If the venue be laid in *London* or *Middlesex*, and the defendant live within forty computed miles of *London*, there must be eight days notice of trial, *exclusive* of the day it is given, but inclusive of that on which the trial is to be had; and if the defendant live above forty computed miles from *London*, then fourteen days notice *exclusive* must be given. *N. on R. M.* 4 *Ann.* (c)

What notice of trial given for the sittings, must specify.

And now, by rule *E.* 51 *Geo.* 3. it is ordered, that in every notice of trial hereafter to be given, for the sitting *after* any term, to be holden at *Guildhall* in the city of *London*, it shall be specified, whether the cause is intended to be tried at the first day of such sittings, or at the adjournment day; and in every case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice eight days before the first day of the sitting after term, if the defendant or defendants reside above forty miles from the above city of *London*: and four days before the said first day, if the defendant or defendants reside within that distance. See 13 *East*, 593. and the like rule in *C. P.* made *H.* 32 *Geo.* 3.

In country causes.

In country causes, eight days notice seems to have been sufficient; but now by stat. 14 *Geo.* 2. c. 17. s. 4, it is enacted that no cause whatsoever shall be tried at *nisi prius* before any judge or justice of assize or *nisi prius*, or at the sittings in *London* or *Westminster*, where the defendant resides above forty miles from the said cities respectively, unless notice of trial in writing has been given at least ten days before such intended trial.

Explanation of statute.

And there are no *negative* words in the statute that there shall be no more than ten days, and as defendant was entitled to fourteen where the venue was laid in *London*, or *Middlesex*, and he resided forty miles from *London*, fourteen days notice must be given agreeable to the old practice. Vide *Barnes*, 305. *Bowles v. Jenkins.* But if

the *venue* be laid in the country, then ten days notice at least is necessary.

In the case of *Perry v. Jackson*, 4 T. R. 519. Mr. Justice Ashhurst says, that in construing another act, meaning 14 Geo. 2. c. 17. s. 3. which requires (if *venue* be laid in the country) ten days notice of trial where defendant resides above forty miles from London, we have determined, that if one of the defendants resides within that distance, so long a notice is not necessary. When ten days notice not necessary.

Notice of trial on the 9th, for the 19th, has been deemed sufficient, under this stat. *Legge v. Williams*, M. 23 Geo. 3. cited in *Tidd*. 6 Ed. 813. n. a. What notice sufficient.

If there be an agent in town the notice must be given to him, who must acquaint the attorney for whom he is concerned. *Barnes*, 37. To be given to the agent in town.

The *venue* was in London, and the plaintiff having given eight days notice of trial, obtained a verdict, no defence being made; to set aside that verdict a rule *nisi* was obtained, on the ground that ten (a) days notice should have been given, the defendant residing in India: and the court made the rule absolute, *Douglas v. Ray*, 4 Term Rep. 552. the point being determined in the C. P. in *Brind v. Torris*, 2 Black. Rep. 1205, which was an arrest in London, *venue* laid there; after arrest and before declaration, he went to Scotland, attorney accepted the declaration in London, and pleaded, the court held fourteen days notice of trial necessary. If the defendant reside in India.

Venue laid in *Middlesex*, defendant lived there at the time of issuing the writ, but before declaration he quitted that residence, and went to reside permanently at Worcester. The court held, that 14 days notice of trial must be given. *Spencer v. Hull*, 1 East, 689. If defendant quit London before declaration, and reside elsewhere.

Notice of trial need not be given the same term the issue is joined, but it must be given in the next term, or defendant may move for judgment as in the case of a nonsuit. See 2 Term Rep. 734. *Hall v. Buchanan*. Need not be given same term issue is delivered.

Sunday is accounted a day in these notices, so it be not the day on which the notice is given. *Mod. Cas. L. and Eq.* 21. Sunday.

(a) I take it the act of parliament is out of the case; it should have been, according to the course of the court, fourteen days.

- Explanation of the act as to the assizes. If notice of trial be given on the 22d of *February*, and there be only 28 days in that month, for the next assizes, and the commission day is the 4th of *March*, it is good notice; for one day is to be included, and the other excluded.
- Prisoner. Notice of trial delivered to a turnkey against a prisoner is good. *Whitehead v. Barber*, *Str.* 248.
- In London. Likewise if the trial is to be in *London* or *Middlesex*, the sittings after *Hilary* term, which ends the 12th of *February*, such sittings is the 14th for *London* (if not *Sunday*.) the 6th is good notice, and 5th for *Middlesex*, being the 13th.
- If cause be made a remanet. If a cause be made a *remanet*, it may be tried at the next sittings, without any other notice; but if the trial be put off by rule of court, (though by a mistake the marshal has marked it as a *remanet*,) there must be a fresh notice of trial. *Tacks v. Mayer*, 8 *Term Rep.* 246.
- So on a peremptory undertaking. So if plaintiff gives a peremptory undertaking to try at the next sittings or assizes, there also a new notice of trial must be given. *Ibid.* *Monk v. Wade*, *Trin.* 26 *Geo.* 3. S. P. because plaintiff may still decline to try his cause. 1 *H. Black*, 222. S. P. *Ifield v. Weeks*, in *C. P.*

When a Term's Notice requisite.

By a note on R. M. 4 *Ann.* it is said, eight days exclusive is sufficient notice of trial, or of executing inquiry in all cases, except causes in *London* and *Middlesex*, where the defendant lives above 40 computed miles from *London*, then fourteen days notice must be given; and likewise, except causes wherein no proceedings have been had within four terms after issue joined, then a term's notice must be given, and so likewise by proviso.

The reason of the rule, is this, that while the matter is still in controversy, the party should after so long lapse, as four times without any proceedings, have notice that he may prepare himself; but when the matter has passed, in *rem judicatum* by verdict, the same rule does not apply. The rule of this court therefore only relates merely to interlocutory stages of the cause. Per Lord *Ellenborough*, C. J. in *May v. Wooding*, 3 *Maule and Selw.* 501.

If notice be given within the year, from the day of the last proceeding, having no regard to the terms, it is sufficient. If given within the year.

The court held, that the giving notice of trial at the end of half a year after issue joined, would prevent the necessity of giving a term's notice, till a year after the last notice, which was given and countermanded. *Str.* 531. *Green v. Gauntlet.* What will prevent.

Per cur. If on an old issue notice of trial be given before the first day in full term, it is sufficient; and it need not be given before the essoign day. 1 *Str.* 211. *Harvey v. Potter.* And this seems to be the settled practice—*contra* 2 *Str.* 1164. Before first day in full term on an old issue,

Where a term's notice of trial is required, there must at the same distance of time, be the like notice of executing a writ of inquiry. *Peyton v. Burdus.* 2 *Str.* 1100.

The rule requiring a term's notice, does not extend to judgment as in case of a nonsuit. *Doe ex dem. Phillips et al. v. Moses,* 5 *Term Rep.* 634. So in C. P. 2 *Black. Rep.* 1223. *Manby v. Worthey.* Does not extend to judgment as in case of nonsuit.

A judge's summons, if no order made, is no proceeding, nor the suing out a venire or distringas in the vacation of the 4th term, though it be tested and entered of that term. 2 *Salk.* 457. 650; but a notice of trial, though countermanded, is; 2 *Salk.* 457. 650.: and so if an order be obtained. A judge's summons.

Plea was delivered in *Hilary* term 1783, and no proceedings had till the 10th *March*, 1784, when issue delivered, and ten days notice of trial given for the next assizes to be held at *Lancaster*; it was said by the master, that there ought to be a whole term's notice. How time is calculated.

If the plaintiff takes no step in the cause for three terms, and in the 4th a concilium is signed, and he obtains judgment in the 5th term; the signing a concilium is taking such a step as to make it unnecessary to give a term's notice. *Bland v. Darley,* 3 *Term Rep.* 530. Signing a concilium is a step to prevent a term's notice.

This rule only extends to voluntary delays made by the plaintiff, and does not apply where the proceedings have been delayed at defendant's request. *Ibid.* To what the rule extends.

When a Term's Notice is not requisite.

It is not necessary to give a term's notice of trial, after If notice has been given of

intention to proceed.

proceedings in the cause have been suspended for a year, if within the year, the plaintiff gave notice that he should proceed again; but the common notice of trial is sufficient. 3 *East*, l. *Richards v. Harris*.

Or an agreement to stay proceedings for a limited time.

Nor where there has been an agreement to stay the proceedings for a limited time, to enable the defendant to pay the debt, in default of which the plaintiff is to be at liberty to proceed. 1 *Black*. 772. *Watkins v. Heyden*.

Not necessary after verdict.

A term's notice, is not necessary where there have been no proceedings, for four terms after verdict. *May v. Wooding*, 3 *Maule and Selw.* 500.

If delayed by Injunction.

If defendant suspend a cause by injunction, plaintiff may proceed without a term's notice.

Debt on replevin-bond, verdict for plaintiff; rule why verdict should not be set aside, cause having been suspended, after issue joined for above a year, and then brought to trial without a term's notice. Lord *Manafeld* expressed his indignation at the defendant's endeavouring to take advantage of a delay, occasioned by himself, to protect himself against a deed under his own hand and seal: it was insisted that the trial without a term's notice was irregular, and that the court of Exchequer, before answer, would have given leave to have proceeded to trial, and that it was universally understood in practice, that an injunction is no excuse for not complying with the established rule. Mr. J. *Buller* said, that the practice was as had been stated: that it was grounded on the principle, that the injunction was no proceeding in the cause depending in this court; but that he thought this a case where the court might very well alter the practice. Rule discharged. *Hayley v. Ryley*, *Dougl.* 71. *Vide* 2 *Black*. 784. 919. Held that a delay by injunction, from the nature of the thing, is an exception to the rule.

Notice of trial for London.

(a) Take notice that this cause will be tried at the sittings after this present *Michaelmas* term, to be held at the *Guildhall* of the city of *London*. Dated, &c. Yours, &c. A. B. plaintiff's attorney. Mr. C. D. defendant's attorney.

For Middlesex.

Doe v. Roe. Take notice, that this cause will be tried at the sittings after this present *Michaelmas* term, to be

(a) If given on a separate paper entitle the cause thus:
In the King's Bench. Doe v. Roe.

held at *Westminster-Hall* in the county of *Middlesex*. If it be at the sittings within term, say, "for the third sittings within this present *Michaelmas* term, to be held at, &c."

If for the country, say, "for the next assizes to be Country. held at *Oxford*, in and for the county of *Oxford*."

"Take notice of trial at the next assizes," without date, If given on county, or name, is good, if indorsed on the back of the issue. the issue, but not on a separate paper. *Henbury v. Rose*, 2 Str. 1237.

Upon the delivery of any paper book wherein an issue is joined, and notice of trial given on the back of the book; if the same be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of the general issue. Notice of trial on special issue, to serve for the general issue.

N. on *Rule, Hil. 8 Geo. 1.*

Where the plaintiff upon any pleading of the defendant, tenders an issue, and the paper book is made up and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if the judgment be given for the plaintiff on the demurrer, the same notice which was given for the trial of the issue, shall serve for executing the writ of inquiry. N. on *R. Hil. 8 Geo. 1.* but plaintiff ought to give notice of the hour and place of executing inquiry. Where plaintiff concludes *ad patriam*, and gives notice of trial, defendant demurs to the replication, in case judgment on demurrer.

Of putting off the Trial.

If the defendant be unable to proceed to trial on account of the absence of a material witness, he may move the court in term, or apply to a judge in vacation to put it off till the next term. But where there is no probability of the defendant's being prepared to try till a more distant time, he may apply to put off the trial till that time. Same notice to serve for inquiry.

The application should be made two days at least before the day of trial, if the necessity for it was at that time known to defendant; if not, it may be made afterwards, even when the cause is called on at *nisi prius*. In that case notice should be given with a copy, and the affidavit to be produced. *Rep. Temp. Hard. 128.* When the application is to be made.

In all cases, whether *criminal* or *civil*, and whether the nature of the proceeding be instantaneous, or otherwise, a trial should not be hurried on, so as to do injustice to the defendant. And an affidavit in common form may

be sufficient, where no cause of suspicion appears, and it is not necessary to swear to merits. *Duncan v. Thomas*, M. 38 Geo. 3. But where a suspicion arises, from the nature of the question, or from contrary affidavits, the court will examine into the ground upon which the delay is asked; and have in criminal as well as civil cases, refused to put off a trial, notwithstanding an affidavit in common form.

To satisfy the court.

It is necessary therefore in such a case as this, 1st. To satisfy the court that the persons are material witnesses; 2dly. To shew that the party applying has been guilty of no laches, nor neglect, in omitting to apply to them, and in endeavouring to procure their attendance; and 3dly. To satisfy the court that there is a reasonable expectation of his being able to procure their attendance at the future time, to which he prays the trial to be put off. *Rex v. D'Eon*, 3 Burr. 1514. And it was held, that if such witness is out of the jurisdiction of the court, as in *France*, the affidavit should state "that he is willing to attend the trial." *Worsley, Bart. v. Blisset*, Hil. 22 Geo. 3.

If libels be dispersed.

If previous to the trial, libels have been dispersed by one of the parties to influence the jury, and witnesses, it may be put off. 1 Burr. 510. *Rex v. Gray*.

Application may be to a judge at N. P.

An application may be made to a judge at *nisi prius*, to put off the trial of an issue directed by the chancellor. 4 Camp. 163.

When court will not put off the trial.

But the court will not put off the trial pending a suit relating to the same matter in a spiritual court. 2 Salk. 646, 649. nor after the defendant has pleaded a sham plea, by which a trial has been lost, unless he pay the money into court. T. 37 Geo. 3. *Stockton v. Hodges*. See 1 B. & P. 454. where the defence of slavery was intended to be established.

If defendant not be met with to make the affidavit.

Generally speaking the defendant should make the affidavit: but there are cases, where the defendant is not to be met with, where a third person's affidavit will be taken. *Fortesc. Rep.* 396. *Barnes*, 448.

If attorney ill.

If the defendant's attorney is so ill as not to be able to attend the trial, the court will put it off upon an affidavit. *Hayley v. Grant*, Say. 63.

Penal statute.

It is said in an action on a penal statute, the court will not put off the trial, in favor of plaintiff, upon the absence of a material witness. Per Lord Kenyon, M. 38 Geo. 3.

Costs to be paid.

The trial is always put off on payment of costs; there-

fore if the rule is not complied with, the plaintiff has a right to proceed to the trial. 1 *Salk.* 83.

It is said, if a witness leaves town after notice of trial is given, the court will not put off the trial. If witness leave town after notice.

The motion will be, that the trial of this cause may be put off until next term, on payment of costs on account of the absence of a material witness on behalf of the defendant: and in the mean time all proceedings be staid, on an affidavit which ought to be made by the defendant (unless he is abroad) to this effect. The motion.

In the King's Bench.

A. B. Plaintiff,
and

C. D. Defendant.

C. D. of, &c. the defendant in this cause, maketh oath and saith, that issue was joined in this cause in *Easter* term last past, and that notice of trial was given for the last sittings within the said term; and this deponent further saith, that I. M. late of, &c. is a material witness for him this deponent, in the said cause, as he is advised and believes to be true, and that he cannot safely proceed to the trial thereof, without his testimony. And this deponent further saith, that he hath endeavoured to find the said I. M. out; that he hath been to the house of the said I. M. and was there informed that he was gone to *Exeter* in the county of *Devon*; and to which place this deponent sent, for the purpose of subpoenaing him; but the said I. M. was gone from there, as this deponent hath heard, and verily believes to be true: and that he this deponent cannot get any information where the said I. M. is, but is informed that he will be at home in one month. And that he this deponent hopes and expects to be able to procure the presence of the said I. M. within the first sittings of next *Trinity* term. Then state the service of notice in case it be so. Affidavit.

This is a rule to shew cause, pay 8s. fee to counsel 10s. 6d.; draw up and serve rule on the attorney of the other side, and make an affidavit of service of the rule, and give brief to counsel to make it absolute, with a fee of one guinea: if absolute draw up the rule and serve it, with an appointment to tax the costs; pay 7s. 6d. The costs must be paid. See 13 *East*, 185. *Nichols v. Boson*. How to proceed.

Short Notice of Trial.

It is ordered that where short notice of trial is to be Short notice to be four

days before
commission
day.

In town, two
days.

accepted in country causes; such notice shall be given at least four days before the commission day, one day exclusive, and the other inclusive. R. E. T. 30 Geo. 3.

In town causes two days is sufficient, but it is usual to give as much more as the time will admit of.

Countermand of Notice of Trial.

If plaintiff be not ready to try pursuant to notice, he may countermand same, which must be in writing; and if the action be laid in *London* or *Middlesex*, and defendant lives within 40 miles of *London*, two days, exclusive of the day on which the countermand is delivered, are sufficient; *Str.* 849.; but if the venue be laid in the country, six days are to be given, at least before the intended trial, pursuant to the statute 14 Geo. 2. c. 17; or if the venue be laid in *London* or *Middlesex*, and the defendant lives above 40 miles from *London*, six days, at least, must also in that case be given.

Countermand
of notice of
trial.

Doe v. Roe. I hereby countermand the notice of trial given you in this cause. Yours, &c. Which is served on defendant's attorney.

Notice cannot be countermanded and continued at the same time. *Vide Barn.* 301.

Costs.

If the plaintiff does not proceed to trial or countermand in time, the defendant shall have his costs. R. M. 1654. s. 18.

The days how
reckoned.

The two or six days notice of countermand, are reckoned, one inclusive, the other exclusive.

Cannot be given on a *Sunday*.

And in a country cause, to be given to the agent in town.

When new
notice is re-
quisite.

After countermand, a new notice must be given. R. M. 1654. s. 18.

Continuance of Notice of Trial.

So he may continue the notice of trial, which is only done in *London* or *Middlesex*; as for instance, if the plaintiff give notice of trial for the first sitting in term, he may by giving notice, continue his notice of trial for the second or third sitting, or sitting after term, but it can be continued only once in a term. *Str.* 1110. *Green v. Gifford.* Two days are sufficient: one day inclusive, the other ex-

clusive; as for instance, *Monday for Wednesday* is good.

"I hereby continue the notice of trial given you in this cause to the sitting after this present *Easter* term." Notice of continuance.

Dated, &c.

In the C. P. a notice of trial given for the sitting after term, cannot be continued to the first sitting in the next term; but in this court, the master thinks it may: and after a notice is countermanded, it cannot be continued.

Costs for not Proceeding to Trial.

If the plaintiff does not proceed to trial, or counter-mand in time, defendant on affidavit of attendance, and necessary expences, shall have his costs taxed. *R. Mich. 1654, sec. 18.* But although the plaintiff does not proceed to trial, whereby costs are taxed for the defendant, and afterwards gives new notice of trial, yet the court will not stay the trial for not paying them (except in ejectment,) because defendant hath another remedy to recover them. *N. on R. M. 4 Ann. (c) Andrews, 17,* by attachment.

Trial put off upon payment of costs, the defendant did not pay, plaintiff proceeded to the trial, and obtained a verdict, and the court was moved to set it aside on payment of costs, and the costs of the motion: It was held that it was a conditional rule, and that the costs ought to have been paid, and refused to set aside the verdict. Trial put off on payment of costs must be paid, or may proceed.

A pauper shall not pay costs for not going to trial. *Str. Pauper. 983, 420.;* but you may move to dispauper him. *Str. 983.*

If the plaintiff does not proceed to trial pursuant to his notice, you may move the court for the costs upon an affidavit, stating, "That the action was commenced in *Easter* term, that in *Trinity* term issue was joined, and notice of trial given thereon for the sittings after the said term, and that the plaintiff did not proceed to the trial thereof, nor countermand such notice." (a) Affidavit to move for costs for not going to trial.

(a) Cannot in this court move for judgment as in the case of a nonsuit, and costs for not proceeding to trial at the same time. *Earl of Leicester v. Wooden, M. 21 Geo. 2.* nor after moving for the former, is he allowed to apply for the latter. *Hullock, 404.* In the C. P. both these motions may be made in the same term. *2 N. R. 247.*

How to move. Give this affidavit to counsel, with half a guinea; who will move for a rule, which is referred to the master in the first instance; draw up same at the clerk of the rules, pay 7s. 6d. get appointment thereon, from the master to tax the costs; if not paid, a demand must be made by defendant's attorney on plaintiff; and if he neglects to pay, make affidavit of such demand and refusal, move for an attachment, which is absolute in the first instance.

N. B. The rule may be made to be paid to *defendant* or his *attorney*.

Affidavit of demand and refusal, if payable to the attorney only.

(a) J. W. of, &c. and C. D. of, &c. the above-named defendant, severally make oath and say, and first this deponent J. W. for himself saith, that he did personally serve the abovenamed plaintiff with a true copy of the rule, and the master's *allocatur* thereon, hereto annexed, *and at the same time shewed him the said original rule and master's allocatur thereon, and that he this deponent then demanded of him the costs allowed by the master on the said rule, but that the above-named plaintiff did not then, nor at any timesince, pay the same to this deponent, and the same now remains unpaid to this deponent. And this deponent C. D. for himself saith, that he hath not received the said costs, or any part thereof, but the same now remains due and unpaid to this deponent.*

The affidavit must state *personal* service and *original* shewn, the day of service, and *demand precisely*; on or about such a day not sufficient. 3 *Term Rep.* 351. 2 *Wils.* 227.

Rule absolute as first observed.

Draw up the rule, and then take same to your clerk in court, at the crown office, who will make out attachment, pay 18s. 6d. get a warrant thereon, and give it to your officer. His fee is one guinea. After this motion, the defendant may move for judgment as in the case of a nonsuit.

TRIAL BY PROVISIO.

Trial by proviso.

THE trial by *provisio* is so called, because in the writ of *distringas juratorum*, there is inserted this clause, *provided that if two writs come to the sheriff, he shall only*

(a) Entitle the cause, and state J. W. to be the attorney for the above-named defendant.

execute and return one of them. 3 *Black. Com.* 357. *Lilly P. R.* 758. 2 *East.* 206.

Formerly the trial by proviso was the only way the defendant had to get rid of the action, if the plaintiff neglected carrying the record down to trial, which was done by obtaining a rule upon such default, for the record to be made up by proviso; but in actions of *replevin*, *prohibition*, and *quare impedit*, both parties being actors, the defendant may sue out a writ of *nisi prius*, although the plaintiff hath not made such default, and proceed to trial; for in such cases the plaintiff is no more obliged to carry down the record, than defendant. 3 *Term Rep.* 661. *Salk.* 652.

In action in replevin, &c. defendant may go to trial.

This mode of trial by proviso (except in the following cases) is superseded by the more summary mode of moving for judgment as in the case of a nonsuit, which is given by the statute 14 *Geo. 2. c. 17.* see title *Judgment as in the Case of a Nonsuit.*

By stat. 7 & 8 *W. 3. c. 22.* If any defendant shall be minded to bring to trial any issue, when by the course of the court, he may do the same by *proviso*, such defendant shall, *of the issuable term next preceding such intended trial*, sue out a new *venire* by *proviso*, and prosecute the same by *habeas corpora*, or *distringas*, with a *nisi prius*, as though there had not been any former *venire* sued out or returned, and so *toties quoties*, as the matter shall require.

The stat. respecting the trial by proviso.

If the cause has been made a *remanet* at defendant's request. 3 *Term Rep.* 1.—If a verdict be set aside and a new trial granted; or a nonsuit, and it is afterwards set aside. 1 *Term Rep.* 492.; or if one defendant pleads, and the other lets judgment go by default, *Say. Rep.* 22. in these cases the defendant must resort to the trial by *proviso*.

In what cases there must be a trial by proviso.

But if the cause is entered, and the record *withdrawn* only, in this case, the defendant need not go to trial by *proviso*, but may move for the like judgment as in the case of a nonsuit. *Read v. Stone*, E, 36 *Geo. 3. 2 East*, 347.

If cause entered, and record withdrawn, not.

Therefore, wherever the statute 14 *Geo. 2. c. 17.* has been complied with, though a subsequent default should be made by the plaintiff, the defendant must resort to his remedy of trial by *proviso*.

If stat. 14 *Geo. 2.* has been complied with.

No trial by proviso can be had in *London* or *Middlesex*, until default made by the plaintiff, *after the issue is en-* proviso can

be had until
default, &c.
made.

tered on record; nor in *country* causes, till the plaintiff hath made default in trying his issue the *next assizes after the issue is entered*; and in neither case till a rule for trial by proviso be entered. N. on R. M. 4 *Ann.*

If both carry
down record.

And if both the plaintiff and defendant happen to carry down the record, at the same sittings, or assize, (which they may do) and enter the same with the marshal, the trial shall be by the plaintiff's record. But if the plaintiff withdraw his record, or if he do not enter it with the marshal, the defendant having entered his record, may proceed in the trial. *Ibid.*

How to proceed.

Str. 1055.

In case the plaintiff has not entered his issue within the usual time, you must obtain a rule from the master to compel him, which is entered with the clerk of the rules; pay 3s. copy same: name the cause first, as thus: *Doe v. Roe*,—next after—to enter the issue on record. Entered, serve same on plaintiff's attorney, when he has entered the issue, and you become entitled to the trial by proviso; which rule is indorsed upon the back of the issue thus: "Let there be a record of *nisi prius* by proviso, if the plaintiff hath made default." Take this to the clerk of the rules to enter, pay 3s. and serve a copy on plaintiff's attorney. When this is done, the defendant's attorney may give notice of trial, pursuant to the rule, M. 1651, which orders, "that due notice of trial be given to the plaintiff, in all causes to be tried by proviso, as well in *London or Middlesex*, as at the *assizes*."

Plaintiff may
also give no-
tice.

When the defendant hath given the plaintiff notice of trying the cause by proviso, the plaintiff may also give him notice of trial, and both of them may return *venires*, &c. and make several records of *nisi prius*, and each may enter the cause for trial; but the trial shall be by the *plaintiff's record* if he enters it; and if he refuses, or withdraws it, then the defendant may proceed on his record.

Costs.

If the defendant does not proceed after notice of trial, he is to pay costs to the plaintiff. N. on Rule Mich. 4 *Ann.* Str. 797. *Wilkinson v. Poole.*

Rule by pro-
viso, if obtain-
ed any time
before trial
will do though
after trial of
notice given.

On the 8th of *March*, 1787, defendant gave notice of trial (the commission day being the 19th,) and on the 10th of *March* obtained and served the *usual rule for a trial by proviso*, and the plaintiff not appearing, was non-suited: motion to set it aside. The court said, that according to the old established practice, wherever the

defendant carries down the record to trial by proviso, he must obtain a rule, *that in case the plaintiff should make default, he might be at liberty to go to trial*. But the only use of that rule is, that if two records are carried down to trial (the one by the plaintiff, and the other by the defendant), *the former only should be tried*. Then it is quite sufficient, if the plaintiff has this writ at the trial. Besides no inconvenience can result from this practice, because if the defendant does not carry down this record to trial after notice, he is liable to pay costs. *Rule refused. King v. Pippett, 1 Term Rep. 492.*

In civil actions the defendant cannot carry down a cause by proviso till there be laches in the plaintiff, *except in causes where the defendant acts as a plaintiff*, as in *replevin, &c. Salk. 652. Sir J. Banks's case*. But there can be no trial by proviso against the crown; because the only foundation for such a trial is laches in the other party, which cannot be imputed to the crown. *1 Term Rep. 695. Rex v. Dyde. 2 East, 209. Rex v. Macleod*, where it was well considered.

There can be no trial by proviso against the crown.

Issue directed out of Chancery, which defendant was desirous of trying, but which (it was suggested) plaintiff wished to delay; and on that ground, *motion that defendant might be at liberty to carry down the record to trial at the next assizes*: court thought the application reasonable, and granted the rule absolute in the *first* instance, saying that the plaintiff would not be damnified by it, for that if he chose to take down the record himself, the costs of this application must be paid by defendant. *Humphage v. Rowley, 4 Term Rep. 467.*

Issue out of Chancery, court will suffer defendant to carry down the record.

On error in fact, defendant may carry down the cause to trial without proviso. *Crompt. 219.*

Error in fact.

OF JUDGMENT AS IN CASE OF A NONSUIT.

TRIALS by proviso, on account of the delay and expence, are much disused: a more eligible remedy being given to the defendant, in case the plaintiff delays proceeding to trial in due time, by stat. 14 Geo. 3. c. 17. which enacts, that where any issue is or shall be joined in any action or suit at law in any of his majesty's courts of record at *Westminster*, and the plaintiff or plaintiffs in any such action or suit, hath or have neglected to bring such issue on to trial; *according to the course and practice of the court respectively*, the judges at any time after neglect, upon motion made in open court, (due no-

tice having been given thereof,) may give the like judgment for the defendant, as in cases of nonsuit, unless the judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue. And if the plaintiff or plaintiffs shall neglect to try such issue within the time or times so allowed, then, and in every such case, the judges shall proceed to give such judgment as aforesaid; and this judgment is to have the same force as judgments of nonsuit, and the defendants to be allowed costs in any action or suit, where they would upon nonsuit be entitled to same, and in no other action.

The course and practice of the court referred to by the statute, is that which before regulated the trial by proviso; and as the defendant could not have had such trial, until the plaintiff had been guilty of laches, nor until after the issue was entered of record, so neither till then, is he entitled to judgment as in the case of a nonsuit.

To what this statute extends.

This statute extends to actions brought by executors or administrators, *Willes*, 316. and to *qui tam actions*, 1 *Wils.* 325. as well as others, to the traverse of the return to a *mandamus*. 4 *Term Rep.* 649. but not to actions of replevin. 1 *Black.* 375.

Discretionary even in penal actions.

The court have always exercised a discretion in granting or refusing the rules in *penal* as well as other actions. *Lawrence*, J. 7 *Term Rep.* 180.

Issue to be entered.

Before judgment as in the case of a nonsuit can be moved for, the issue must be entered on record.

In a town cause.

If an issue in a town cause be joined in *Trinity* term, and delivered *with notice of trial* for the sittings after *that term*, and the plaintiff does not proceed to trial, the defendant may move for judgment in *Michaelmas* term as in case of a nonsuit. *Harman v. Gilbert*, M. 36 Geo. 3.

If an issue delivered in *Trinity* term, and no notice given.

If an issue is delivered in *Trinity* term as of that term in a town cause, and *no notice of trial is given*, yet if the plaintiff was in time to have given notice for the sittings in or after term, and did not proceed to the trial thereof, this motion, it is said, cannot be made until *Hilary* term, because he has not said (by giving notice of trial) that he is ready to proceed.

If delivered late in term.

If the plaintiff delivers his issue so late in *Trinity* term, as not to be able to give notice of trial for the sitting after that term, then the defendant cannot move until the *Hilary* term following, *Michaelmas* term being the term in which he makes default.

The issue was joined 11th *November*, early enough to have given notice of trial for the sittings after *Michaelmas* term, the *venue* being in *London*; but as plaintiff did not give such notice then; *motion for judgment as in the case of a nonsuit*, 6th *Feb.* The court held, that as the plaintiff had not given his notice in *Michaelmas* term, he was not entitled to the judgment, and discharged the rule. *Munt and another v. Tremamondo*, 4 *Term Rep.* 557. *contra* 1 *H. Bl. Rep.* 65. *Frampton v. Payne.*

Although the issue be joined early in term so as to give notice, yet not bound so to do till next term.

Issue joined in *Easter* term, and notice of trial given for the first sittings in *Trinity*, and the plaintiff having continued it till the sittings after that term, the defendant in the same term moved for judgment as in the case of a nonsuit, which was refused. *T. 36 Geo. 3. Fitzgerald v. Smith. Tidd*, 6 *Ed.* 822. See 1 *Bos. & P.* 387. in *C. P.*

Issue joined in *Easter*, notice of trial for first sitting in *Trinity*, continued till after term.

If an issue be joined in *Trinity* term, and delivered in a country cause, with notice of trial for the then next assizes, if the plaintiff does not try his cause, the defendant may move for judgment as in the case of a nonsuit in *Michaelmas* term (although he compel the plaintiff by rule to enter his issue in that same *Michaelmas* term.)

Country cause.

If an issue be delivered so late in a country cause, that the plaintiff could not give notice of trial as of *Trinity* term, then the defendant cannot move for judgment as in the case of a nonsuit until *Easter* term following (his default not happening till *Lent* assizes.)

It was ruled, that the rule requiring a term's notice of intention to proceed, does not extend to a motion for judgment as in case of a nonsuit. *Doe ex dem. Philips v. Moses*, 5 *Term Rep.* 634. So determined in *C. P.* *Manby v. Worthly*, 2 *Bl. Rep.* 1223.

Term's notice does not extend to judgment, as in case of a nonsuit.

How to proceed.

In order to proceed regularly (the issue being entered on record,) move the court on the following affidavit: notice of this motion need not be given. *Loft.* 265.

J. W. of, &c. attorney for the defendant in this cause, maketh oath and saith, That issue was joined in this cause, in *Hilary* term last past, and notice of trial was given for the sittings after the said term: and that the said plaintiff did not proceed to the trial thereof pursuant to the said notice.

Affidavit.

Sworn, &c.

J. W.

Give it to counsel with 10s. 6d. and remember to have the roll in court; or, if you are at *Westminster* before the sitting of the court, Mr. *Platt* will mark it in the treasury, "read," pay 1s. 6d. In the evening draw up the rule, pay 8s. 6d. serve copy on plaintiff's attorney, make affidavit of the service: give it to counsel with one guinea, to make it absolute, which cannot be moved by him till *the day after* the day for shewing cause.

What affidavit must state.

To support this motion in the *next term after* that in which *issue was joined*, the affidavit must state *that notice of trial was given for a sitting in the preceding term*; but in the third or other subsequent term, a *general affidavit* stating, *the term when the issue was joined*, is deemed sufficient. 1 *H. Black.* 282.

If in third or other term.

Plaintiff must shew some excuse.

On the part of the plaintiff, if only one notice has been given, it is necessary for him to shew some *reasonable excuse* why he did not proceed to trial; for undertaking peremptorily to try, at the next sittings, or next assizes, will not do; there must be *some excuse* in this court, though a *slight* one will do, with a peremptory undertaking; but the practice in the C. P. is contrary; if after *two* notices, the court will expect a *real excuse*, as they will after the *first notice* in penal actions, not choosing such kind of actions should hang over the head of the defendant; and in other actions shew as a reason *the absence of a material witness*, naming him, and all endeavours used to subpoena him, and when expected home, or any other real cause. If put off, it is only from term to term. (a)

If after two notices.

Even a slight excuse on a peremptory undertaking even in a *qui tam* action will do.

Plaintiff's attorney assigned as a reason that he was not enabled to prepare briefs for counsel in time, on account of the plaintiff having been *absent* on a *journey*, and *not* having *returned home till the day before the assizes*: upon this excuse, the court discharged the rule, and Lord *Kenyon* said, that there was no difference between *qui tam* and other actions. The excuse was slight, but almost any excuse upon affidavit was sufficient upon giving a peremptory undertaking. *Rule discharged. Stone qui tam v. Farey*, 1 *East*, 554.

(a) Unless it appear, that there is no probability of defendant's being prepared to try, till a more distant time, in which case he may apply to put off the trial till that time.

The court discharged a like rule in a *qui tam* action, 7 Geo. 2. c. 8. where plaintiff withdrew his record, because the broker who negotiated the illegal bargain refused to give evidence for fear of subjecting himself to a penalty, though his liability to be sued, would not be removed, till after the three succeeding terms. *Raynes qui tam v. Spicer*, 3 Term Rep. 178.

Where plaintiff withdrew his record in a *qui tam* action.

Insolvency of the defendant, since the action brought, is a good excuse for not proceeding to trial, for it would be extremely hard, if a party should be obliged to proceed, and put himself to expence, without a possibility of recovering either debt or costs. *Bayley v. Wilkinson*, Dougl. Rep. 670.

Insolvency of defendant.

But it is said, unless the plaintiff will consent to stay all further proceedings, and enter a *cesset processus*, the court will bind him down to a peremptory undertaking. In the above case the rule was discharged.

Cesset processus.

If the rule be discharged, on an affidavit which contains an answer false in itself, the court will not afterwards open the matter on an affidavit which disproves the former one; but if it is suggested at the time that the answer was false in fact, the court will suspend their judgment on it till the matter is examined. *Davis v. Cottle*, 3 Term Rep. 406.

Rule discharged on affidavit which is false, court will not open the matter again.

When not entitled to this Judgment.

Action against two on a joint promise; judgment against *Walker* by default; issue joined by *Goyton*, and the plaintiff neglected to bring it on to trial, and the common rule for judgment as in the case of a nonsuit obtained. Court held, that as the plaintiff was not liable to be nonsuited at the trial, the defendant therefore was not entitled to this judgment. *Weller v. Goyton and Walker*, 1 Burr. 359. 1 *Ld. Raym.* 716. 12 *Mod.* 651.

When not entitled to this judgment.

After a plea of tender there cannot be a nonsuit. *Harding v. Spicer*, 1 *Camp.* 327. 2 *Hen. Black.* 377.

Held that plaintiff having once carried down the record to trial, and nonsuited, which nonsuit was afterwards set aside, he had complied with the statute; therefore defendant in this case must carry it down by proviso. *King v. Pipplet*, 1 Term Rep. 492.

If once the cause has been carried down.

Issue was joined in a country cause early enough in last *Trinity* term to have given notice of trial for the summer assizes; and because no such notice was given, motion in *Michaelmas* term for judgment as in the case

If notice was joined early enough for the next assizes, yet plaintiff not bound to give notice.

of a nonsuit. Court: the plaintiff is not bound to give notice of trial till the term succeeding that in which issue was joined, and that in this case, plaintiff had given notice of trial in this term. *Hall v. Buchanan*, 2 Term Rep. 734.

If cause carried down and made a remanet, no judgment. If the cause has been carried down, and although made a remanet by counsel on certain conditions not complied with, yet judgment as in the case of a nonsuit shall not be given, for the statute is complied with by carrying it down once. *Mewburn v. Langley*, 3 Term Rep. 1.

If plaintiff enters his record and withdraws it. If the plaintiff enters his record, and withdraws it, judgment as in case of nonsuit will be granted. Unless the plaintiff consent to a peremptory undertaking. *Burton v. Harrison*, 1 East, 346. *Reed v. Stone*, S. P. cited by Mr. J. Le Blanc, E. 36 Geo. 3.

Executors. Executors are not liable to costs on a judgment as in the case of a nonsuit. 2 H. B. 277. 4 Burr. 1928. *Willes*, 316.

If Rule absolute.

If rule absolute, how to proceed. If the defendant makes the rule absolute, draw up same at the clerk of the rules; pay 7s. 6d. then get a 10s. stamp put upon the rule, bespeak the roll of Mr. Edge, so as the master may mark the costs; pay in term time 1s. 6d.; in vacation, 5s.; 10d. for the keys of the treasury; chief clerk's fee, 4s. 6d.

If Cause put off on peremptory Undertaking.

If cause put off on a peremptory undertaking, and no proceeding to trial. * If the cause is put off on a peremptory undertaking, the plaintiff must draw up the rule, pay 9s. 6d. and serve it on the defendant's attorney: and if he does not proceed to the trial then apply for an office copy of the rule; and move the court for judgment on the following affidavit; fee to counsel half a guinea.

Affidavit.

J. K. of, &c. attorney for the defendant in this cause, maketh oath and saith, that this honourable court was moved in last *Hilary* term for judgment as in the case of a nonsuit, and upon shewing cause, the plaintiff peremptorily undertook to bring on the said issue to be tried at the first sittings within this present *Michaelmas* term; whereupon the annexed rule was made; and this deponent further saith, that the plaintiff did set down the said cause (*as the case is*) for trial in pursuance of the

said rule, but withdrew his record, and did not proceed to the trial thereof.

TRIAL AT BAR.

FORMERLY all trials were had at the bar of the court in actions which were first commenced here; but this seldom happened, except in matters of consequence, as trifling suits were brought and determined, in the court baron, hundred, or county-court. Formerly all trials were had at bar.

Now by virtue of the commission of *nisi prius* all common causes are tried at the assizes, and at the sittings in London, and Westminster. And trials at bar are now fallen into disuse, (except in cases of difficulty and importance.) Trials at bar must be in difficult cases.

The trial at bar, is a trial in term time, before all the judges of the court, which is obtained by motion in court on an affidavit of the nature and intricacy of the cause, and if obtained, it must be tried by a special jury. The granting of it, is entirely in the discretion of the court, and it will not be granted without good reason, as it is expensive and delays the business of the court; and the particular difficulty which is expected to arise, ought to be pointed out. *Sayer Rep.* 79. See 1 *Term Rep.* 366. Is to be in term time. On affidavit and special jury. Discretionary in the court to grant it.

After issue joined, and not before, *Str.* 696. you may move to have a trial at bar, which must be by special jury. *R. Trin.* 8 *W.* 3. If the attorney on one side shall make default to appear to strike out twelve, the secondary shall name the jury in his absence and strike out twelve, and the rest to be returned, the party applying to be at the expence, stat. 3 *Geo.* 2. c. 25. (but this cannot be had when venue in London, the citizens not being to be brought out of the city.) *Str.* 854. *Vide* 2 *Wilson*, 136, *contra*. See 1 *Term Rep.* 366. 2 *Salk.* 644. It is granted either upon account of the value of the lands, or difficulty of the title, for which reason the court will not grant it till issue joined, 12 *Mod.* 331.; nor can it be granted, though the parties consent, without leave of the court. *Str.* 696. But in ejectment, a trial at bar may be ordered before issue joined, *Say. Rep.* 155; but not before plea. *Lill. Prac. Reg.* 741. 13 Ed. 1. c. 30. 35 H. 8. c. 6. 4 & 5 P. & M. c. 7. 5 Eliz. c. 9. 7 & 8 W. 3. c. 32. s. 2.

It ought to be moved for in the term preceding that in which it is intended to be tried; as in *Hilary* for *Easter*, and in *Trinity* for *Michaelmas* term, except where the lands in *Middlesex*. And *Buller, J.* said, it is never allowed in an issuable term, *Coleman v. the City of Lon-* When to be moved for.

don, M. 21 *Geo.* 3, unless the crown be concerned in interest, *N. on R. M.* 4 *Ann* (c), or under very particular and pressing circumstances. 1 *Str.* 52. 2 *Lill. P.* R. 615. and 271. 237. 1 *Burr.* 273.

Of the notice of the trial.

It is said, anciently there was no other notice given of such trial, than the rule in the office, but afterwards fifteen days notice. *Salk.* 649. Now, notice of trial must be given as in other causes: and when the rule is obtained, the day appointed ought to be entered into the clerk of the papers' book in the office; and before it be so entered, notice of trial ought not to be given. *Lill. Prac. Reg.* 741. *Sty.* 509.

The notice in the county of Middlesex, dated, &c.

The notice should be, *To be tried at the "bar of the court, on, &c. at Westminster-hall;"* a copy of the rule may be served at the same time.

When the copy of issues is to be left with clerk of papers.

A week previous to the trial, copy of the issue is to be left with the clerk of the papers, who makes four copies for the judges, and delivers them, the plaintiff's attorney pays the clerk of the papers' fees; the record is to be left with the chief justice as in other cases.

What a proper case.

The most proper case for a trial at bar is, where it appears that a question of law, of some nicety, will arise, and that this will be so complicated with a question of fact, that the whole matter must be determined by the jury, under the direction of the court. *Trin.* 4 *Geo.* 3. *Whitaker v. Burrow*, C. P.

Grounds for granting a trial at bar.

Partridge shewed cause against a trial at bar, that lessor of plaintiff was in such indigent circumstances as not to be able to bear the expence, and that one of his witnesses was a woman of eighty, who might die before the trial. The value of the premises 2000l. a year, and the question whether a codicil, by which they were devised, was duly executed. 2 *Salk.* 648. cited. Court were of opinion, that this was a case fit for a trial at bar; but said, as it was a favor asked by the defendant, they would lay him under terms, that if he succeeded, he should only have *nisi prius* costs; but if lessor were to succeed, he should have bar costs; and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial. That the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk* where the premises were situated, which was consented to. *Holmes v. Brown, Dougl.* 318. (a)

(a) The court refused a trial at bar, on the mere alle-

It was moved that the lessor having privilege, might Lessor privilege name a good plaintiff to be liable to costs; refused. leged. *Preston v. Linger, Str.* 479.

If a justice of the one bench or the other be concerned, If one of the ed, the trial shall be at bar, upon motion without affidavits, &c. *Justices, &c. davit. 1 Sid.* 407. *Morton v. Hopkins.*(a)

The affidavit on which the application is made must state the value and difficulty, as in ejectment, that the title will depend on the deduction of a long and intricate course of successions and descents, and the effects and operation of several deeds; and that a variety of points of law and other questions will arise, which, he conceives, and is advised, will be necessary that the cause should be tried at the bar of the court. It will be a rule to shew cause. What the affidavit should state.

The plaintiff may countermand the notice of trial, though it be a trial at bar (which is always appointed by the court), and prevent the cause being tried at the day, nor can it be brought to trial, unless some day be appointed again by the court. May countermand. N. on R. M. 4 *Ann.* (c)

A trial at bar is had upon the *venire* or *distringas*, as at common law, without any clause of *nisi prius*; and by a special jury of the county where the action is laid. Of venire or distringas, and jury. 1 *Burr.* 292. Six days notice at least ought to be given to the jurors before trial. *Say. Rep.* 30. And in *Denn v. Lord Cadogan*, where nine of the jurors only appeared, the counsel for the plaintiff prayed a *decem tales*, as this trial could not, by the course of the court, have come on again till *Michaelmas* term (this being *Easter*,) there being gentlemen sufficient in two to make a complete jury, the court ordered the return of *decem tales* to be on the *Monday* following (though there had been no instance before of it). But had there not been sufficient, the trial must have been adjourned, and a *decem* or *octo tales* awarded, as at common law. 5 *Term Rep.* 457. For the parties in this case cannot pray a *tales* upon the statutes; and no writ of *alias* or *pluries distringas*, with a *tales* for the trial of issues at bar, shall be sued

gation of length, and probable questions of difficulty, in a cause respecting a pedigree. *Doe ex dem. Angel v. Angel, T.* 36 *Geo.* 3.

(a) Or a master in Chancery.

out, before the precedent writ of *distringas*, with the panel of the names of the jury annexed, shall be delivered to the secondary of the court, to the intent that the issues forfeited by the jury for not appearing upon the precedent writ, may be duly estreated. 2 *Lill. P. R.* 123.

A new trial may be moved for.

After a trial at bar, a *new trial* may be moved for, as in other cases. 1 *Burr.* 395. *Bright v. Eynon.*

County palatine.

As to a county palatine, see 7 *Term Rep.* 735. 1 *Term Rep.* 363. (a)

On a trial at bar in this court, it is the secondary's duty, to call over, and swear the jury, and record the verdict, whether taken in court, or in private, after the court is adjourned; of the clerk of the rules, to mark the deeds and papers given in evidence, and to have the custody of them after trial till called for; and of the clerk of the papers, to read the record, and the written evidence. See *Tidd*, 6 *Ed.* 808.

SPECIAL JURY.

Rule as to serving the rule, and entering the cause in London and Middlesex.

No cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury be served, and the cause marked in the marshal's book as a special jury, on or before the day preceding the adjournment day in *Middlesex*, and *London*, respectively. *Reg. Gen.* 44 *Geo.* 3. 10 *East.* 1.

How to apply for a special jury.

Give brief to counsel, with the name of the cause, and indorse thereon, "To move for a special jury;" (fee 10s. 6d.) he will sign it; take it to the clerk of the rules, who will draw up rule, (pay him 8s.); get an appointment thereon from the master to nominate the 48, serve copy on the attorney on the other side, and the sheriff also must be served; attend master, and he will nominate the forty-eight, (pay master 2l. 2s. sheriff 2l. 2s.) when this is done, master's clerk makes out copies for each party, (pay him 5s.) When you are ready to strike, then apply to the master for another appointment; serve copy of rule, and that appointment on the attorney: attend the master again, and he will strike out twelve on each side, beginning with the plaintiff first; the clerk then makes copies, which reduces them to twenty-four, to try the issue, and a special writ of *distringas* juratorum issues for that purpose. Though the

Discretionary in master, whether he will strike ex parte, till the third appointment.

jury be at the instance of the defendant, yet the plaintiff is bound to sue out the distringas, and summon the jury. (a)

The person or party, who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury: and shall not have any farther or other allowance for the same upon taxation of costs, than such person, or the party, would be entitled unto, in case the cause had been tried by a common jury, unless the judge, before whom the cause is tried, shall, immediately after the trial, certify in open court under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury. Stat. 24 Geo. 2. c. 18.

No costs of a special jury shall be allowed, unless the judge certify in court.

No person who shall serve upon a special jury, or be returned, shall be allowed to take for such serving on any such jury, more than the judge who tries the cause shall think just and reasonable, not exceeding 11. 1s. (except in causes wherein a view hath been directed.) Same stat.

None to take more than one guinea, except where there is a view.

Where the action is for a *debt* due, and it appears that the rule is obtained for *no other purpose than delay* by the defendant, if notice of trial should be given for a sitting *in term*, I should think the court would on application make the defendant undertake to give judgment of the term. It has been done in the Common Pleas, see *Tidd*, in (n.) 716. when delay is suggested, and not satisfactorily denied.

Observation.

A jury was nominated in *Michaelmas* term, but the 24 had not been struck out by the parties. In *Hilary* term, appointments were made out, and defendant's attorney (though he attended) refused to strike, because the jury were nominated in *Michaelmas* term. Lord *Manfield* was clear the master ought to do it, without any direction from the court; and said it was right for him to act as usual, unless there should appear any particular reason to the contrary: in the present case, there had been no change of sheriffs, which Lord *Manfield* observed had been given as a reason why the same jury should not serve for the trial of the cause, which had

The change of sheriffs makes no difference if the jury be once nominated.

(a) If the motion is made, fourteen days after an *issuable* term, or seven days after a non-issuable term, a judge's order must be obtained previous to the rule being drawn up.

been already struck for a former intended trial. But he said he did not see the reason why the change of the sheriffs should make any difference. Mr. *Wallace* said, the court of C. P. had lately determined it should be so, and that the change of sheriffs made no difference. *Cowp. Rep.* 412. *Rex v. Hart*. This is now the established practice.

If after special jury struck, cause goes off, for want of jurors, the first jury must try.

In *Trinity* term a special jury was struck, but for default of jurors at the sittings after said term, the information was not tried.—A rule was obtained for striking a new jury, which *Erskine* moved to discharge, on the ground that, after a special jury had been once struck, the jury alone, or as many of them as appeared when the cause came on to be tried, with the addition of talesmen only, could try the cause, and the court made the rule absolute. *Rex v. Perry*, 5 *Term Rep.* 455.

When rule is to be drawn up.

The rule is to be drawn up in *London*, and *Middlesex*, before the adjournment day after each term, and served. See *R. T.* 30 *Geo.* 3.

Rule at N. P. as to the appointment of particular days for special jury causes not defended.

Upon application made, to appoint particular days for the trial of special jury causes where there was no defence, Lord *Ellenborough* said, I wish this to be understood to be the rule in future.

If the jury has been reduced, and a case be made out, shewing that there is no defence, I will appoint a particular day, that the plaintiff may have the benefit of the trial; but if the jury has not been reduced, the trial must come on as a common jury cause. 1 *Stark. N. P.* 31.

VIEW.

View may be granted in any action where necessary.

FORMERLY there could not have been a *view* in personal actions, but upon withdrawing of a juror after they were sworn, and consent of the parties by a rule of court. Now in actions of *waste*, *trespass*, *quare clausum fregit*, and other actions, where it appears to the court to be proper and necessary that the jurors, whether common or special, who are to try the issues, should, for the better understanding of the evidence, have the messuages, lands, or place in question viewed, the court is authorised by stat. 4 & 5 *Ann. c.* 16. s. 3, to order special writs of *distringas*, or *habeas corpora*, to the sheriff, requiring him to have six of the jurors, or a greater number of them, at the place in question, some

The statute.

convenient time before the trial, who then and there shall have the matters in question shewn to them by two persons named in the writs to be appointed by the court; and the sheriff executing the writs is especially to return the *view* made accordingly.

By stat. 3 Geo. 2. c. 25. (the balloting act) s. 14. it is provided, That where a view shall be allowed, six of the jurors named in the panel, or more, shall have the view, and shall be the first sworn (or such of them as appear) before any drawing, and so many only shall be drawn to be added to the viewers who shall appear as shall, after all defaulters and challengers allowed, make up the number of twelve, to be sworn for the trial of such cause. But as the having a view was not by either of the statutes made a matter of course, though such a practice had prevailed and had been abused for the purposes of delay, the court thought it their duty to take care that their ordering a view should not obstruct justice, and prevent the cause from being tried; and they resolved not to order one any more, without a full examination into the propriety and necessity of it: for they were all clearly of opinion, that the act meant that a view should not be granted, unless the court was satisfied, that it was proper and necessary; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view, than be delayed for a greater length of time: accordingly they added a clause to the usual rule for views, purporting that the party praying a view consented, "That in case no view should be had, or if a view should be had by any of the jurors whomsoever (though nots ix of the first twelve), yet the trial should proceed, and no objection be made on account thereof, or for want of a proper return." Since which motions for views are become motions of course without affidavit, with such additional consent annexed to them. *Vide 1 Burr. Rep. 256, 257.*

Six of the jurors or more, shall have the view, and first sworn, or such as shall appear.

The clause.

In actions of waste, *trespass, quare clausum fregit* and *nuisance*, the motion is of course, the necessity appearing on the face of the pleadings; and the motion for it is a motion of course, requiring only counsel's signature. But in other cases a special application is made upon an affidavit of the circumstances, and it is a rule to shew cause

When of course.

In term time give brief to counsel "to move for a view," fee 10s. 6d.; take the brief to the clerk of the rules, who will draw up same, 12s., but first apply to the opposite attorney for the name of his shewer, and place of abode, and

How to obtain rule.

have yours ready, so that the rule may be properly filled up; and also the day and place where the jurors are to meet must be inserted. When you have drawn up the rule, serve copy on the opposite attorney, leave the original, with the names of the jurors (if special), with the sheriff, if common, he will summon bail as he thinks proper; pay him 2l. 2s; his fee for attendance 1l. 1s.; and no evidence is to be given on the view but the premises only as heretofore with dinners; but in the country it is, and are to be shewn. In town it is not usual to treat the jury at the expence of both parties. N. B. In vacation; by consent, you may have a judge's order for a view, upon producing counsel's hand, fee 10s. 6d. The expences are equally borne by both parties, which is particularly stated in the rule. (a)

Shewers may
shew marks,
&c.

The shewers may shew marks, boundaries, &c. to enlighten the viewers, and may say to them, these are the places to which on the trial we shall adapt our evidence. See *Barnes*, 457. *Goodtitle v Clark*. See my C. P. 399, 5ed.

Rule for a
view by a
common jury.

A. B. } It is ordered that a writ of distringas juratores
against } issue, directed to the sheriff of the county of
C. D. } in which shall be contained a clause commanding the said sheriff to have six or some greater number of the jurors to be impanelled and returned to try the issue between the parties, who shall be mutually consented to by the said parties or their agents, at the place in question before the time of the trial of the said issue, (to wit) upon the day of instant; and that E. F. of &c. on the part of the plaintiff, and G. H. of &c. on the part of the defendant, shall attend the same day, and shew the matters in question to the said six or some greater number of the said jurors who shall be consented to as aforesaid. And that the expence of taking the said view shall be equally borne by both parties, and no evidence shall be given on either side at the time of taking thereof; the plaintiff (or defendant) consenting that in case no view shall be had, or if a view shall be had by any of the said jurors, whether they shall happen to be six or any

(a) If the opposite attorney will not name a shewer on his part, an appointment on the rule must be given by the master for this purpose, which attend, and if no attendance, the master will name one for him. But I do not remember a refusal, for the order of the court is peremptory.

particular number of the jurors who shall be so mutually consented to as aforesaid, yet the said trial shall proceed, and no objection shall be made on account thereof, or for want of a proper return to the said writ. Upon the motion of *Mr.* ———

By the Court.

A. B. } It is ordered that a writ of *distringas juratores* Rule for a
against } issue, directed to the sheriff of the county of view by a
C. D. } in which shall be contained a clause commanding the said sheriff to have six or more of the first twelve of the jurors to be impanelled and returned to try the issue between the parties at the place in question, before the time of the trial of the said issue, to wit, upon the day of instant, and that E. F. of &c. on the part of the plaintiff, and G. H. of &c. on the part of the defendant, shall attend the same day and shew the matters in question to the said six or more of the first twelve of the said jurors: and that the expence of taking the said view shall be equally borne by both parties, and no evidence shall be given on either side at the time of taking thereof; the plaintiff (or defendant) consenting that in case no view shall be had, or if a view shall be had by any of the said jurors, whether they shall happen to be any of the twelve jurors who shall be first named in the said writ or not, yet the said trial shall proceed, and no objection shall be made on account thereof, or for want of a proper return to the said writ.—Upon the motion of *Mr.* ———

By the Court.

RECORD OF *NISI PRIUS* BY BILL.

THE record of *nisi prius* is supposed to be transcribed from the issue roll, and contains an entry of the declaration and pleadings delivered with the award of the *venire facias* of the issue, as in the issues or paper book, and is in the nature of a commission to the judges at *nisi prius*, for the trial of the cause, and is to be ingrossed on a ten shilling stamp parchment, and made up by the attornies themselves.

In every record to be made up, there must be two placitas, the one preceding the issue, which is to be of that term in which the issue is joined, the other after the end of the award of the *venire facias* (or the end of the issue as delivered,) the term the cause is to be tried. But

if the cause is to be tried the same term the issue is joined, then both *placitas* are to be of that term. (a)

So if there is a demurrer.

If there be a demurrer to any of the pleadings, and the cause is to be tried before or after that be disposed of, all the proceedings must be entered on the *nisi prius* record, the same as made up in the paper book.

But if respondeas ouster be awarded on a plea in abatement.

But where there has been a plea in abatement, and a judgment of *respondeas ouster* awarded, and the defendant pleads in chief afterwards, the issue is made up without taking notice of any of the pleadings in abatement. 7 Mod. 51.

Where two partners sever in pleading.

Assumpsit against two, they sever in pleading. One pleading bankruptcy, on which issue was joined; the other pleaded a judgment recovered against him and the other defendant. There was a *nolle prosequi* entered, not to proceed further against the bankrupt, and plaintiff proceeded to final judgment against the other. On error being brought, the judgment was affirmed. *Note & Chiswell v. Ingham*, 1 Wils. 89.

As to amending the record.

The *nisi prius* record may be amended in court, after the cause is called on, by a rule made instantan on the consent of both parties. *Murphy v. Marlow and another*, 1 Campb. 57.

When a *nolle prosequi* may be entered against one.

Where there are several defendants, and they sever in plea, whereupon issue is joined, the plaintiff may enter a *nolle prosequi* as to one defendant at any time before the record is sent down to be tried at *nisi prius*. 2 Roll. Abr. 100. Salk. 457. *Greeves v. Rolls*.

No rule for costs.

Where there is a *nolli prosequi* entered on any of the counts, there is no rule for allowing costs for such counts. *Hubbard v. Biggs*, 16 East, 129.

Two defendants pleading different pleas, *nolle prosequi* as to one of them, does not discharge the other.

In assumpsit against two, where one pleads *non assumpsit*, on a plea of bankruptcy, and the plaintiff enters a *nolle prosequi* as to him, as to the several matters pleaded by him, and the other defendant pleads *non assumpsit*, the latter is not discharged by the *nolle prosequi*. *Moravia and another v. D. Hunter and another*, 2 Maule and Selw. 444.

(a) And the record then concludes, with an entry called the *jurata*.

The Record.

Pleas before our lord the king at Westminster, of the Record where the issue and trial are of different terms.
term of the holy Trinity, in the 57th year of the reign
of our sovereign lord George the third, by the grace of
God of the united kingdom of Great Britain and Ireland,
king, defender of the faith, and in the year of our
Lord 1817.

*Roll 520.**Law and Markham.*

London, { Be it remembered,—(to end of the *issue*
 to wit. { *verbatim*); then enter a second placita as
 follows:

Pleas before our lord the king at Westminster, of the Second pla-
term of St. Michael in the 57th year of the reign of our cita.
sovereign lord George the third, by the grace of God of
the united kingdom of Great Britain and Ireland, king,
defender of the faith, and in the year of our Lord
1817.

London, { The jury between A. B. by his attor- Jurata for
 to wit. { ney, plaintiff, and C. D. defendant, of a London.
 plea of trespass on the case^a, is respited before our lord a Or debt, as
 the king at *Westminster*, until next after the action is.
^b, unless the right honourable *Edward lord El-* b The return
lenborough, his majesty's chief justice assigned to hold of the distrin-
 pleas before the king himself, shall first come, on^c gas.
 the day, at the *Guildhall* of the said city, c The day of
 according to the form of the statute in such case made trial.
 and provided, for default of the jurors, because none of
 them did appear; therefore let the sheriffs have the
 bodies of the said jurors, make the said jury between
 the parties aforesaid, of the plea aforesaid; accordingly,
 the same day is given to the parties aforesaid, at the
 same place.

If the cause is to be tried in *Middlesex*, say, "unless, If in Middle-
 "&c. shall first come on the day sex.
 "at Westminster hall, in the county of Middlesex,"
 and say *sheriff*.

If at the assizes, "unless his majesty's justices as- If at assizes
 "signed to take the assizes in and for the county of
 "Oxford, shall first come on the
 "day of July at Oxford, in the said county, ascord-

"The last day of term your last placita is of.

To be entered in town two days before sittings.

"ing, &c." and at the "(a) end of the jurata add, And be it known that the king's writ on record was delivered to the deputy sheriff of the said county, on the d day of in this same term before our lord the king at Westminster, to be executed according to law, at his peril."

"It is ordered, that unless the causes to be tried at London and Middlesex be entered with the chief justice of this court by the space of two days before the sittings upon which such causes are to be tried, the marshal may enter a ne recipiatur, at the request of the defendant or his attorney." R. H. 15 & 16 Car. 2.

Time for Entry of Cause.

Time for entering causes for London and Middlesex after term.

Ordered, that in future, all causes to be tried at the sittings after term, shall be entered, and the records delivered to the marshal, at the times following: The causes in Middlesex, the first day of the sitting after term in Middlesex; and the causes for London, two days before the adjournment day, in London. R. Hil. 34 Geo. 3. The rule M. 17 Geo. 2. is at an end so far as relates to the entry. (b) They are to be entered by nine in the evening.

Rule as to setting down causes where there is a special jury.

It is ordered, that no cause for the future be tried by a special jury, unless the rule for such special jury be drawn up, and the cause marked as a special jury in the marshal's book of causes, before the adjournment day after each term. By the court. R. Trinity term, 30 Geo. 3. 1790.

Every cause to be tried in the order they stand, unless, &c.

Ordered, that every cause to be tried at nisi prius, in London and Middlesex, shall be tried in the order in which it is entered (beginning with remanets,) unless it shall be made out to the satisfaction of the judge of nisi prius in open court, that there is a reasonable cause to the contrary, who thereupon will make such order for the trial of the cause so to be put off, as to him shall seem just. R. Mich. 17 Geo. 2.

(a) This is only added when the cause is to be tried at the assizes.

(b) The record may be amended by a judge's order, though in the hands of the marshal.

It is ordered, that if the defendant in any action in *London* or *Middlesex*, and to be tried at the sittings of the *lord chief justice* of this court, shall enter a *ne recipiatur*, and by reason thereof hinder the plaintiff that he cannot proceed at that sitting, that then it shall be lawful to the said plaintiff to proceed to trial in the said cause at the next sitting of the said *chief justice*, after the entering of the said *ne recipiatur*, upon notice given during the said first sittings. *R. Mich. 4 Ann.*

If the plaintiff be hindered of a trial by a *ne recipiatur*, may try the cause at the next sittings, on notice.

But if a cause is to be tried at the sittings after term no *ne recipiatur* can be entered, until after proclamation made by order of the chief justice for bringing in the records; and then if the record be not brought in, the defendant's attorney may enter a *ne recipiatur*. *N. on the above rule.*

When may enter a *ne recipiatur*.

Likewise if notice of trial be given for a day certain in *London* or *Middlesex*, and the plaintiff is not ready to proceed, the cause may be tried the next sitting, upon the like notice as when a *ne recipiatur* is entered by the defendant: and in either case, if the cause be not tried at such next sitting, notice is to be given as at first, unless it be made a *remanet*, and then new notice of trial is never given; for the defendant is bound to attend till the cause be tried. *N. on R. M. 4 Ann.*

Remanet.

Remanet. (a)

Whenever the cause is made a *remanet*, no new notice need be given; but defendant must attend till the cause be tried. *2 Lill. Pr. R. 745.*

Remanet.

If the cause is not tried the day of the sitting, it is then made a *remanet* by the marshal of course; he alters the *jurata*, pay him 5s. get the *distringas* of him, and alter the return to the day of the next sitting (if it be a proper return day,) if not, the next day, reseal it, pay 7d. annex it to the record again, as there is no occasion for the sheriff to return a new panel, nor is there occasion for a new stamp.

Remanet how to be made.

Care ought to be taken respecting this, for the *jurata*, if not altered, is not amendable, and the trial will be

Jurata must be altered.

(a) So called because the cause remains in his lordship's paper of causes continued.

coram non iudice; but the court will order a *venire facias de novo*. 1 Wils. 144. *Crowder v. Rooke*.

Remanets, writs of *distringas*, and record to be resealed.

Ordered, that the writs of *distringas*, and the records in causes, which stand over from one sitting to another, be regularly *resealed*, previous to the sitting to which they stand over; or in default, the causes be not tried. R. E. 33 Geo. 3.

How to enter the issue, and pass the record in town.

When the record is ingrossed, make an *incipitur* on a roll (which get of Mr. *Adams*, of Lincoln's Inn) first entering thereon the term the issue is joined, *warrants of attorney* for plaintiff and defendant, and part of the *memorandum* of the issue; take the *issue* and *record* to the clerk of the judgments, who enters the issue, marks the *roll*, *record*, and *issue paper*, pay him 3s. 6d. for the first ten sheets, and 1s. for every six more; if the issue should be of an old term, and the entries have not been made before, first get a number-roll of Mr. *Edge*, the clerk of the treasury, Essex-street, Strand, of the term issue is joined, then make out a *docket* paper for the entry; go to the clerk of the judgments, Mr. *Clarke*, who will enter the issue as before; take the record to Mr. *White's* office, *King's Bench Walks*, under the *K. B.* office, who will pass same, pay 7s. 6d. for the first eight sheets, and 7s. for every other eight, and 6d. to the sealer. (a)

For the Assizes.

How to proceed at the assizes.

If at the assizes, the issue is to be entered the same as before, and record passed at the same office with the clerk of the circuit in which the cause is to be tried; get the *venire* returned in town with the under sheriff, pay him 2s. 6d.; send the *distringas* and *venire* into the country annexed to the record, and the writ and record are to be entered together, and left with the judge's marshal; pay 14s. 8d. (b)

Writ and record to be entered together.

Ordered, by all the judges of *England*, that in every cause to be tried before them in their respective circuits,

(a) Mr. *Provost* acts as deputy to most of the clerks of the *nisi prius* for the different circuits, appointed by the *custos brevium*.

(b) If in ejectment, the rule by consent is sent down with the record, in case there be no difference.

the writ and record shall be entered together, and that no record shall be received without the writ. T. 10 & 11 Geo. 2.

Ordered, that no record of *nisi prius*, for the trial of an issue at the assizes, shall be sealed after the end of three weeks next after the end of the term. The practice is altered, for by obtaining a judge's order (which you now pay for at the time of passing the record 2s. and which the officer will procure at his leisure,) you may have your record sealed, at any time before the assizes. The time of sealing record.

It is ordered, that no writ and record of *nisi prius* shall be received at the assizes in any county in *England*, unless they shall be delivered to be entered with the marshal before the first sitting of the court after the commission day (except in the counties of *York* and *Norfolk*.) and there the writs and records shall be delivered to, and entered with the marshal, before the first sitting of the court on the second day after the commission day, otherwise they shall not be received, and every cause shall be tried in the order in which they shall be so entered, without any preference or delay; unless it shall be made out to the satisfaction of the judge, in open court, that it is impracticable or inconvenient so to do; who thereupon may make such order for the trial of the cause so put off, as to him shall seem just. And that a list of the causes, when so entered, shall be made by the marshal and forthwith fixed up in some public place in the *nisi prius* court, there to remain during the whole time of the assizes. Entry of record at the assizes.
R. H. 14 Geo. 2.

Ordered, by all the judges of *England*, that no writ of record of *nisi prius* shall be received at the assizes in and for the county of *Norfolk*, or city of *Norwich*, unless such writ and record be delivered to, and entered with the marshal, before the first sitting of the court, or the day next after the commission day. R. H. 32 Geo. 3. If in Norfolk and Norwich, when to be entered.

The variance between the issue delivered and record ought to be mentioned at the trial and objected to; if the record be wrong, the court will amend it by the issue roll after verdict and defence made. The issue was 200l. damages, record stated 300l.; and roll accorded with it. Vide 2 *Wils.* 160. Variance between issue and record.

If one of the defendants die *after* issue joined, it should be suggested on the roll, and entered on the record; but if properly suggested on the roll, though not so accurately If one of the defendants die, it should be suggested upon the roll

set forth on the record, it is enough. 1 *Burr.* 363. *Far v. Denn*, 8 & 9 *W. 3. c. 11. s. 7.* See title *Suggestion*.

Variance from
issue.

If the record of *nisi prius* agree with the declaration delivered, a variation from the issue delivered is not material. *Str.* 1131. *Shepley v. Marsh*, 2 *Wils.* 160.

For record of *nisi prius* by original, *vide* title *Proceedings by Original*.

VENIRE AND DISTINGAS.

WHEN the record is ready, then sue out writs of *venire* and *distingas* (both of which are sealed only) pay 1s. 2d. get the *distingas* returned at the sheriff's office, pay in *Middlesex* 14s. 8d. in *London* if common, 4s. 4d. if special 8s. 8d. and annex it to the record with the panel.

Venire facias
if proceedings
by bill.

George the third, &c. to the sheriff, &c. greeting. We command you that you cause to come before us, at *Westminster*, on next after (a) (here insert some return-day *before* the trial, if a country cause, the *last day of the term*,) twelve free and lawful men of the body of your county, each of whom having 10l. a year at the least, of lands, tenements, or rents, by whom the truth of the matter may be the better known, and who are in no wise a-kin either to A. B. the plaintiff, or to C. D. the defendant, to make a certain jury of the county between the parties aforesaid in a plea of trespass on the case (or as the case may be;) because as well the said C. D. as the said A. B. between whom the contention thereupon is, have put themselves upon that jury; and have there then the names of the jurors, and this writ. Witness, *Edward Lord Ellenborough*, at *Westminster* (the first day of the term in which the cause is to be tried,) in the 57th year of our reign.

Law and Markham.

The like
where one
defendant
pleads, and
the other lets
judgment go
by default.

In case one of the defendants suffers judgment to go by default, and the other pleads to issue, after the words, to make a jury of the county between the parties aforesaid, add these words, as well to try the issue between the said

(a) If by original, return to be on a general return day, wheresoever, &c. the acts of parliament respecting the jury process are properly arranged in my *Office of Sheriff*.

A. B. and C. D. joined, of a plea of trespass on the case, as to inquire what damages the said A. hath sustained by reason of the not performing the said promises and undertakings by the said R. made, as for his costs and charges by him sustained in this behalf, whereof it is considered, that the said A. ought to recover his damages, because as well the said R. as the said A. between whom the contention thereupon is, have put themselves upon that jury; and have there then the names, &c.

If it is a *venire de novo*, George, &c. we command you that you cause to come anew, before us (as in the other.) Venire de novo.

If there are two sheriffs, and one is interested in the cause, or related to either of the parties, the *venire* should be awarded to the other only; or if both are interested, then to the coroner of the county, which *interest* should be suggested in the issue. If sheriffs are parties, the coroner to return venire.

George the third, &c. To the sheriff of, &c. greeting: we command you that you distrain the several persons named in the panel annexed to this writ; the jury summoned in our court before us, between A. B. plaintiff, and C. D. defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any for them, intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that you have their bodies before us at *Westminster*, on next after (here insert the first return-day after the trial or) before our right trusty and well-beloved *Edward Lord Ellenborough*, our chief justice, assigned to hold pleas in our court before us, if he shall first come on (the day of trial,) if in *London*, say at the *Guildhall of the city of London*, aforesaid; if in *Middlesex*, say, "at *Westminster-Hall in the county of Middlesex*;" if at the assizes, say, "before our justices assigned to hold the assizes in your county, if they shall first come on" (the day of trial) at (the place where held) in your county, according to the form of the statute in that case lately made and provided, to make a certain jury between the said parties, of a plea of trespass on the case (as the action is,) and to hear thereof their judgment of many defaults, and that you have there the names of the jurors and this writ. Witness *Edward Lord Ellenborough* at *Westminster*, the day of in the 57th year of our reign. Common distringas. Return day of the venire.

Law & Markham.

If distringas
be made of
by proviso.

(If the defendant makes out the *distringas*, by proviso, after the words, many defaults, insert the following proviso) Provided always, that if two writs shall come to you thereupon, then you execute and return one of them only; and have there the names, &c.

Distringas for
a special jury.

George, &c. to the sheriffs of London, greeting: we command you, that you distrain J. L. of, &c. J. O. of, &c. (and so on, till you come to the end of the master's list,) then add the jury summoned in our court before us (as in a common one;) and if there is a view after the word (default) add this, "and in the mean time, according to the form of the statute in such case made and provided, we command you, that you have six or more of the first twelve of the said jurors, to take a view of the place in question, on the day of and that the said jurors meet on the same day, at the house of (as in the rule) in your city, and proceed from thence to view the said place, in the presence of T. B. on the part of the plaintiff, and G. H. on the part of the defendant, appointed by our court before us, to shew the said place to such of the said jurors as shall come to view the same; and that you make appear to us at Westminster, on the said day, in what manner you shall have executed this our command, and have there then this writ. Witness Edward Lord Ellenborough," &c.

If for a common jury.

And in the mean time, according to the form of the statute in such case made and provided, we command you, that you have six or some greater number of the said jurors who shall be mutually consented to by the said A. B. and C. D. or their agents, to take a view of the place in question on the day of and that the same jurors meet (as above.)

SUBPŒNA AD TESTIFICANDUM.

The use of
this process.

FREQUENTLY witnesses will not attend *voluntarily*; therefore for the administration of justice, it was thought necessary that there should be some *compulsory process* to bring them to give their testimony; which process is by writ of *subpœna ad testificandum*, the form whereof is as follows:

Subpœna to
testify.
Is a stamp.

George the third, &c. To J. D., R. R., &c. (a) greet-

(a) Four witnesses may be put in one subpœna. *Cowp. Rep. 646.*

**Teste it the
last day of
the term.**

Law and Markham.

***Middlesex subpoena*, to testify between A. B. plaintiff, Præcipe for
and C. D. defendant, on the part of the plaintiff. subpoena.**

To be signed by Messrs. *Provost* and *Chambre*; pay 1s. 8d. and 7d. seal; serve each witness with a copy personally; pay 1s. in town; if in the country the party must have his expences tendered him.

If a cause appointed for one sitting is made a *remanet*, If a remanet. the *subpoena* must be re-sealed, and re-served.

In *Sydenham v. Rand*, T. 24 Geo. 3. It was determined, that where a notice in writing is given in such case for the last sitting, instead of a *subpœna*, the court will not grant an attachment thereon against the witness for non-attendance. *Same case*, and *Gillet v. Mawman*, T. 47 Geo. 3. C. P. *Ibid.*

There must be a reasonable time before the day of trial; for witnesses ought to have a convenient time to put their own affairs in such order, as that their attendance upon the court may be of as little prejudice to themselves as possible. 1 Str. 510. *Hammond v. Stewart*. The subpoena was served at two in the afternoon, to attend the sittings that day in *Middlesex*. Reasonable time must be given.

Where the witness lives at a greater distance than *London*, he is not obliged to attend, unless his reasonable expences are paid or tendered him, not only for

Reasonable expences must be tendered.

going to, but also for returning from the trial; and where less is offered, the witness is not obliged to trust to the court's allowing him more when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again. *Fuller v. Prentice*, 1 *H. Bl.* 49. 2 *Str.* 1150. *Chapman v. Pointon.* (a)

Action lies for them if not paid, although not examined on that account.

One who is subpœnaed as a witness, and attends the trial, but refuses to give evidence unless expences paid, and not examined, may maintain assumpsit for his necessary expences. *Hallet v. Mears*, 13 *East*, 16.

I take the law to be that a witness is not to be a judge whether he be a material evidence or not; he is bound to obey the subpœna.

An attachment against an attorney for non-attendance.

An attachment lies against an attorney in the cause for non-attendance upon a subpœna to give evidence of collateral facts. *Wyatt v. Winkworth*, 2 *Str.* 810. *Ld. R.* 1528. (b)

So against a peer.

And it may even be had against a peer of the realm. *Cow. R.* 845. See *Rex v. Dixon*.

As to an attorney being subpœnaed with a *duces tecum* to give evidence of a charge of forgery on his client, 3 *Burr.* 1687.

Cause must be called on, to make a witness liable.

To make a witness liable, in an action for his non-attendance, the cause must be called on and jury sworn. *Bland v. Swafford*, *Peake's Cas.* 62. Withdrawing the record on that account will not do. The court has no jurisdiction till such time as the jury are sworn. *Lord Kenyon*.

If witness does not attend, to what he is liable.

If the witness does not attend, he is liable, 1. *Either to an attachment*; 2. *A special action on the case*, *Doug.* 561.; 3. *Or the penalty of 10*l.* by stat. 5 Eliz. c. 9. s. 12*, and also for the further recompence given by that statute, *if it has been previously assessed; by the court out of which*

(a) The expences of a person sent to inquire after the subscribing witnesses to a bond are not allowed on taxation of costs. *Laing v. Bowes*, 3 *Maule and Selw.* 89.

(b) It is said, that if the witness is not served personally with a copy of the subpœna, it is not sufficient to warrant a proceeding criminally against him. *Smart v. Whitmill*, 2 *Stra.* 1054. But if served personally, there can be no doubt of an attachment for non-attendance. *Ibid.* 810. *Wyat v. Winkworth*.

the process issued. *Ibid.* *Pearson v. Hes*: But not by the jury or judge of *nisi prius*. The punishment will be remitted, if the witness make satisfaction. *Doug.* 560.(a)

If any person has in his possession any writings, deeds, books of account, or other things, which may be necessary to produce at the trial, he should be served with a *subpœna duces tecum*; but if the plaintiff or defendant are to produce, or the attorneys, then a notice to them will be sufficient. 3 *Term Rep.* 306.

Subpœna
duces tecum
when neces-
sary.

"George, &c." as in the former one, as far as the place of trial, then say, And that you bring with you and produce at the time and place aforesaid, a deed of assignment, bearing date (describe the thing to be produced,) and then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain action now in our court before us depending, between, &c. (as in the former one); it is signed with Messrs. *Provost and Chambre*, and sealed.

Subpœna
duces tecum,
5s. stamp;
signing 1s. 8d.
seal 7d.

This writ is of compulsory obligation on a witness, to produce papers thereby demanded, which he has in his possession, and which he has no lawful or reasonable excuse for withholding: of which the court, and not the witness, is to judge. *Amey v. Long*, 9 *East*, 473.

Compulsory
obligation.

It is likewise decided in the same case that an action will lie against a party refusing to produce a paper in his actual possession; and it is no defence that the legal title to such paper is in another person. 1 *Camp. N. P. Rep.* 14.

As to bring-
ing an action
if disobeyed.

This writ is not to be found in *Registrum Brevium*, nor any where else prior to the term of *Car. 2.* when it is to be found in *Clerk's Manual* 31. *Thesaur. Brev.* 304. and *Officina Brevium* 385. *Registrum Brevium* does not contain the common subpœna. See *Doug. R.* 556, 561. where witnesses have been proceeded against as for a contempt before the stat. 5 *Eliz. c. 9.*

(a) The motion for an attachment must be made as soon as possible: the court refused an attachment in *Hilary* term, for non-attendance at the preceding assizes, and left the party to his civil remedy. — *v. St. Leger*, 11. 37 *Geo. 3.*

Of the Ha. Corp. ad Testificandum.

Of the habeas
corpus ad tes-
tificandum;
5s. stamp.

This writ issued where a witness is confined in prison, directed to the marshal, sheriff, &c. in order to bring him before the court where the cause is to be tried, to give evidence on the part of the person who sues it out.

This writ cannot be obtained either by motion in court or before a judge, without an affidavit made by the party applying, that the witness is a material one. *Fart.* 396.; and it must be signed by a judge, or of no effect. *Cowp.* 672. If it appear to be a contrivance to get the witness out, court will refuse it. 3 *Burr.* 1440. *Rex v. Burbage.* (a)

Sailors on
board a ship
of war.

If *sailors on board a ship of war*, are to be produced as witnesses, and have been served with a *subpœna*, and say they *will attend*, a *habeas corpus* may be applied for to the chief justice, on affidavit of that fact, and that they are *material witnesses*; but without which no *ha. corp.* can issue. *Rex v. Roddam*, *Cowp. Rep.* 672. 4 *East*, 587. *In re Ed. Price.*

Prisoner of
war.

Court thought there could be no *ha. corp.* to bring up a prisoner of war. Lord *Manfield* said, the presence of witnesses who were prisoners of war, was generally obtained by an order from the secretary of state: and an application was made for a *hab. corp.* to bring up such a prisoner, but without success. Afterwards a rule was granted to shew cause why defendant should not consent either to admit the fact of the capture, or that the prisoner should be examined upon interrogatories. If this consent be refused, the court said, they would put off the trial from time to time, to give the defendant an opportunity of filing a bill in equity. The plaintiff agreed to produce all letters received concerning the matters in litigation. *Furly v. Newnham*, *Doug. Rep.* 420. 6 *Term Rep.* 497.

(a) See stat. 44 *Geo.* 3. c. 102. which gives discretionary power to a judge to award a *hab. corp. ad testificandum*, to bring any prisoner detained in any gaol, in *England* or *Ireland*, before any of the courts, or any sitting of *visi prius*, to be there examined, &c.

In the King's Bench.

A. B. plaintiff,
and

C. D. defendant.

A. B. of, &c. the above named plaintiff, maketh oath and saith, that this cause is set down for the sittings after this present term to be holden at, &c. and that J. B. now a prisoner for debt, in custody of the marshal of this court, is, and will be a material witness for this deponent at the trial of this cause. And this deponent further saith, that he is advised, and verily believes, that he cannot safely proceed to the trial thereof, without the testimony of the said J. B. and that he is willing to attend the trial of this cause. Affidavit to obtain same.

Sworn, &c.

A. B.

George the third, &c. To the marshal of our prison of the *Marshalsea*, greeting, (or to the person in whose custody he is): We command you, that you have the body of J. W. in our prison, under your custody, as it is said, detained under safe and secure conduct, by whatsoever name the said J. W. may be called in the same, before our right trusty and well-beloved *Edward Lord Ellenborough*, our chief justice, assigned to hold pleas in our court before us at *Westminster-hall*, in the county of *Middlesex*, "or at *Guildhall*, in the city of *London*," (if at the assizes) "before our justices assigned to hold the assizes in and for the county of *Oxford*, on *Monday* the day of next, at *Oxford*, in "the said county," by nine of the clock in the forenoon of the same day, there to testify the truth, according to his knowledge, in a certain cause now depending in our court before us, and then and there to be tried between A. B. plaintiff, and C. D. defendant, in a plea of trespass and assault (as the action is) on the part of the said C. D. and immediately after the said J. W. shall then and there have given his testimony before the said chief justice (if in town,) if in the country, "before our said justices," to return him, the said J. W. to our said prison, under safe and secure conduct; and have you there then this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, &c. Habeas corpus ad testificandum.

Law and Markham.

A *præcipe* is to be made (after allowed by the judge,) sign it with Messrs. *Provost* and *Chambre*; pay 1s. 8d. seal 7d. then leave it with the marshal or sheriff in which

custody defendant is; he is to be paid the usual fees, and will attend with the witness.

Foreign witnesses.

The master will allow for foreign witnesses, the journey and voyage going and coming, and during their stay in *England*, but not the voluntary stay in *England*, after the trial, nor the contingent losses which witnesses may have suffered. *Thelluson v. Staples*, *Doughl.* 438.

EXAMINING WITNESSES ON INTERROGATORIES BEFORE A JUDGE.

If after issue is delivered, and notice of trial given, a witness that is material on either side is so ill that he cannot attend, or is going abroad, or resides abroad, so that he cannot be had at the trial, the party who wishes for him may apply to the court for a rule, that he may be examined on interrogatories *de bene esse* before one of the justices of this court, or before commissioners appointed, but he cannot be examined without consent; and the court will stay the proceedings, as by putting off the trial, if not consented to. *Doughl.* 419. *Furley v. Newnham*, *Cowp.* 174. *Fabrigas v. Mostyn*. It is a rule to shew cause, and the motion is made upon affidavit "of his being material upon the part he is to be examined, without whose testimony you cannot proceed to the trial, and that he is going to *Scotland, Ireland*, or out of the kingdom, on such a day;" counsel's fee is 10s. 6d. for the rule to shew cause, and one guinea to make it absolute; rule 2s. per sheet; serve it on the attorney on the other side; make affidavit of the service, and if consented to, the rule will be made absolute. Notice must be given, and a copy of the interrogatories delivered to the opposite attorney of the time he is to be examined, so that the other party may be at liberty to file interrogatories, and cross-examine him on his part. (a)

In vacation a judge's summons.

If it is in vacation, application must be made in a summary way; get a summons from a judge to shew cause why A. B. a material witness, may not be examined, on the part of the plaintiff, on interrogatories, and upon pro-

(a) It is said, if plaintiff will not consent, he cannot have judgment as in the case of a nonsuit. *Tidd*, 737.

doing the like affidavit as before, and consented to, the order will be granted. (b)

By stat. 13 Geo. 3. c. 63. s. 44. it is enacted, that when and as often as the East India Company, or any person or persons, shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen in India, against any other person or persons, in any of his majesty's courts at *Westminster*, it shall be lawful for such court respectively, upon motion there to be made, to provide or award such writ or writs in the nature of a *mandamus*, or commission, as therein mentioned, for the examination of witnesses; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause, or action. This is a writ of *mandamus* directed to the judges of the supreme court, or judges of other courts; and the court has awarded such a writ, before issue joined. *Trin. Term*, 35 Geo. 3. *Spalding v. Mure*. How when the East India Company are plaintiffs for causes arising in India. 24 Geo. 3. c. 25. 42 Geo. 3. c. 85. s. 1, 2. 8 East, 35.

The witness is to be taken with the interrogatories to the judge's clerk, who examines him, and the interrogatories are to be left there, and he is to be sworn upon them; after he is examined on both sides, the judge's clerk will deliver out copies of the depositions. Where to take witnesses.

As the depositions are only taken *de bene esse*, they cannot be made use of, if the witness is to arrive in this country at the time of the trial. 2 Salk. 691. 12 Mod. 493. *Bull. N. P.* 239. If party arrives in England.

The party succeeding is not entitled to the costs of examining the witnesses on interrogatories, or taking office copies of the depositions, unless it be so expressed in the rule. 2 East, 259. *Stephens v. Crichton*, *Hullock on Costs*, 437. *An.* 24 Geo. 3. And this holds with regard to witnesses examined abroad, as well as here. 8 East, 393. *Taylor v. Royal Ex. Ass. Co.* see 3 Bos. and Pull. 556. As to costs.

"Interrogatories to be administered to John Dean, a witness to be produced, sworn and examined, on the part and behalf of A. B. plaintiff, against C. D. de- The form of interrogatories.

(b) The interrogatories are to be prepared and signed by counsel, and so are the cross interrogatories, see discretionary; and to be ingrossed on a 5s. stamp parchment.

*"fendant, before ———, knight, one of his said
 "majesty's justices of the same court, in a certain cause
 "now depending in his majesty's court of King's Bench
 "at Westminster, pursuant to a rule of the said court,
 "made on next after in the 57th year of
 "the reign of his majesty king George the third;" or if
 it is an order say, "pursuant to an order of the said jus-
 "tice, made the day of 1817."*

Imprimis.

Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either, and which of them, and how long have you known them or either, and which of them? declare the truth, and your knowledge herein.

Secondly.

Look upon the deed or writing now produced and shewn to you at this the time of your examination, marked with the letter A, and purporting to be an indenture bearing date, &c. was such deed or writing sealed and delivered in your presence, and by whom? Were you a subscribing witness to the sealing and delivering thereof? And is the name E. F. indorsed thereupon, and appearing as the name of one of the witnesses, of your own hand-writing? You know the hand-writing of G. H. appearing to be the other witness to the said deed or writing? Is that name G. H. indorsed thereupon of the proper hand-writing of the said G. H.? And did you see him set and subscribe his name as a witness thereto? Set forth the particulars at large, according to the best of your knowledge, remembrance, and belief, and the truth declare.

**Last interro-
 gatory.**

Lastly, do you know of any other matter or thing, or have you heard, or can you say any thing touching the matters in question, that may tend to the benefit and advantage of the said plaintiff in this cause, besides what you have been interrogated unto? Declare the same fully and at large, as if you had been particularly interrogated thereto. J. D.

**Interrogato-
 ries for de-
 fendant.**

Interrogatories to be administered to Richard Fenn, a witness to be produced, sworn and examined on the part and behalf of C. D. the defendant in a certain cause now depending against him in his majesty's court of King's Bench at Westminster at the suit of A. B. plaintiff, before, &c.

The clerk of the rules draws up a special rule, to examine witnesses on interrogatories, and if commissioners are to examine the witnesses, he will insert therein the

commissioners names, which is their authority; and they make their return as directed by such rule of court.

Interrogatories to be administered by way of cross-examination to R. F. a witness, &c. as before. Cross-examination.

The costs are always borne by the party obtaining the rule, and do not abide the event, unless so ordered specially by the court. *Anon. E. T. 1802.* Costs.

COUNTIES PALATINE.

IN actions brought in counties palatine, no jury process is issued out of the courts above, a *mittimus* of the record to the justices there, commanding them to cause a jury to be summoned to try the issue between the parties, and return the same when tried to the courts at *Westminster*, being the only writ sued out here on this occasion: and the record is passed at Mr. White's office in the same manner as other records are. (a) *Mittimus only sent.*

George the third, &c. To our justices of our county palatine of Lancaster, greeting: The tenor of a certain record before us at Westminster, between A. B. plaintiff, and C. D. defendant, in a plea of trespass on the case (or as the plea is,) we send you inclosed in these presents commanding you, that (having inspected the same) by our writ under the seal of our said county palatine, you command the sheriff of the same county that he cause twelve free and lawful men of the body of the same county palatine to come before you at your next general session of assize there to be holden, after this writ shall be delivered to you, each of whom having 10l. a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into, and who are in nowise related either to the said A. or to the said C. to recognize and make a jury of the country between the said parties, of the plea aforesaid, because as well the said C. as the said A. between whom the controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors, so to be impanelled between the said parties, as is in this behalf used and commonly made, according to the law and custom of the said county palatine, until the issue

Mittimus to the county palatine of Lancaster.

The venire and ha. corp. are made out by the prothonotary there.

This writ is signed with Messrs. Provost and Chambre, sealed.

(a) In counties palatine, there is no second *placita jurata*, or *sciendum*, but the record of *Nisi Prius* ends with the award of the *mittimus*.

Signing 1s.
8d. seal 7d.

aforesaid between the said parties shall be fully tried ; (b) and when the verification and issue aforesaid shall have been there made and tried before you, then do you send the record of the said plaint, together with every thing that shall have been done before you thereupon, and also this writ to us at *Westminster*, at a certain day which you shall appoint to the said parties, to be in our said court here, to hear judgment thereupon. Witness Edward Lord Ellenborough, &c. *Law and Markham.*

Mittimus to
the county.
palatine of
Chester.

George, &c. To our chamberlain of our county palatine of Chester, or to his deputy there, greeting : the tenor of a certain record which is depending in our court before us, at *Westminster*, between A. B. plaintiff, and C. D. defendant, of a plea of trespass on the case (or as the plea is) we send you inclosed, in these presents, commanding you, that by our writ under the seal of our said county palatine, duly to be made out, you cause the said record to be sent to the mayor of the city of Chester, and county of the same city, commanding the said mayor, that for the trying of the said issue in the said record specified, the said mayor do command the sheriffs of the same city of Chester, and county of the same city, that they cause to come before the said mayor, at a certain day and place by the said mayor to be appointed, after the said record shall have been delivered to him, twelve free and lawful men of the body of the city aforesaid, and county of the same city, each of whom, &c. by whom, &c. and who are in nowise, &c. to recognize, &c. because as well, &c. And lastly, that the said mayor make such further process against the said jurors, so to be impannelled between the said parties, as according to the law and custom of the said city, and county of the same city, is in this behalf used and commonly made, until the issue aforesaid between the parties aforesaid, shall be fully tried : and when the verification and issue aforesaid shall have been there made and tried, then the said mayor shall send to you the said record of the plaint aforesaid, with every thing that shall have been then and there done and tried before him therein, so that you have the said record before us at *Westminster*, and this writ, at a certain day

(b) If there be a view then add the clause—And that in the writ of *habeas corpora juratorum* to be issued by you in this cause, there be contained a clause commanding the sheriff of the said county palatine to have six or more of the first twelve jurors, &c.

which the said mayor shall appoint the said parties to be in our said court here, to hear judgment. Witness, *Edward Lord Ellenborough, &c.*

Where it appears that a fair and impartial trial cannot be had in the county of the city of Chester, the court will award the trial to be had in the county palatine of Chester. *Rex v. Inhab. of St. Mary, 7 Term Rep. 735. 2 Str. 976. 2 Barnard, 402.* If a fair trial cannot be had.

BRIEF.

THE brief is instructions to counsel, for stating and supporting the party's case in whose behalf it is made up and delivered, for calling witnesses to prove or disprove such matters as may benefit or prejudice the client, and for properly conducting the cause through the course of the trial: and to this end, it should contain *the names of the parties, an abstract of the pleadings, the case truly stated*, with such other observations thereon as may be judged necessary and proper; and lastly, *the names of the witnesses*, with a short mention (as an index to the case, by way of proof) of what they respectively know in support thereof, that the counsel may not be at a loss to call the proper witness, for proof of particular facts, as may be necessary. (a) Brief.

In the brief the names of the plaintiff and defendant are only once used, which is placed at the top of the sheet thus:

Between A. B. plaintiff,
and

C. D. defendant.

In the King's Bench.

London (ss.) The plaintiff declares, for that whereas the defendant, &c. here state the counts as short as you can to the end of the declaration: then the plea, replication, rejoinder, &c.; afterwards the case and evidence.

EVIDENCE.

FOR the benefit of the profession, I have selected a few general heads, and leading maxims, relative to the law of evidence.

(a) Mr. Sellon says, the grand rule to be observed is conciseness and perspicuity. I perfectly agree with him.

As in public judicatures it is necessary to search into the truth of facts as they really are, hence whatever may be exhibited to a court or jury, whether it be by matter of record or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty the truth of any matter in dispute, whether such matter relates to a person's life, liberty, or property, is called evidence.

In debt on bond, or deed. Upon an action of debt, when the defendant denied his bond, by the plea of *non est factum*, and the issue is whether it be his deed or no, the plaintiff must prove the due execution of it, by the subscribing witness, or, if dead, the hand-writing of the obligor and witness, as also his death.

Two kinds of evidence. Evidence in the trial by jury is of two kinds, either written or parol, that is, by word of mouth. Written proofs, or evidence, are, 1. *Records*, and 2. *Ancient deeds of thirty years standing*, which prove themselves (unless erased or interlined in material matter.) *Bull.* 251. But 3. *Modern deeds*, and 4. *Other writings*, must be attested and verified by parol evidence of at least one of the subscribing witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of, shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed.

Best evidence to be given. 3 *Blask. Com.* 368. *Carth.* 220. *Sho. Rep.* 39. For if it be found that there be any better evidence than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. No evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute), the courts admit of hearsay evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts. 1 *Mod.* 283.

Discourse no evidence.
General customs, hearsay evidence good.

When admitted. But though hearsay be not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. *Ibid.* So too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner, after the year, by stat. 7 *Jac.* 1. c. 12. nor of themselves within the year, without some circumstances

Books of account.

to make them so ; but a servant who made the entry may have recourse to them to refresh his memory : and if such servant (who was accustomed to make these entries) be dead, and his hand-writing proved, the book may be read in evidence. 1 *Salk.* 285. *Bull.* 282. The statute excepts accounts between merchant and merchant, in the usual intercourse of trade.

All persons, of what religion or country they may be that have the use of their reason, are to be received and examined, except such as are infamous, &c. *Salk.* 690. *Bull.* 288. or such as are interested in the event of the cause. *Co. Lit.* 6. *Ib.* 237. ; but it must be a present, not a future contingent interest. 1 *Salk.* 283, 257. The husband cannot be a witness for or against the wife, nor the wife for or against husband. *Ibid.* Bail cannot be a witness unless exonerated. *Str.* 436.

Who are good witnesses.

Who not.

A party interested for the sake of trade and the common usage of business, may be a witness, as a porter in a shop, or banker's clerk. *Ibid.* 284. So a party interested where no other evidence is reasonably to be expected, as on the statute of hue and cry. *Ibid.* So where he acquires the interest by his own act, after the party who calls him as a witness, has a right to his evidence. *Ibid.* *Skin.* 586. 3 *Lev.* 132. So where the possibility of interest is very remote. 2 *Lev.* 231.

What persons interested may give evidence.

One witness, if credible, is sufficient to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proof. *Carth.* 144. The civil law requires two. *Show.* 158. 3 *Mod.* 283.

One witness.

In actions on general acts the printed statute book printed by the king's printer is evidence, but not on private acts. There the party must have an office-copy examined with the parliament roll.

General acts of parliament.

Records exemplified under the broad seal may be admitted in evidence. *Bull.* 225. But the exemplification of deeds under the broad seal cannot. *Ibid.*

Records.

If a verdict is to be given in evidence, an office-copy of the whole record must be made by the proper officer, examined and sworn to. *Gilb.* 25.

Verdict.

No verdict shall be given in evidence, but between such who are parties or privies to it. 1 *Ray.* 730. ; with this restriction, that it is of a matter which was in issue in the former cause. *Hob.* 53. *Vide Carth.* 131. 2 *Str.* 1151.

Bargain and sale.

Where a deed is inrolled (pursuant to the statute), the indorsement of the inrolment is evidence without further proof. *Bull.* 225, 251. 3 *Lev.* 387. *Dougl.* 56.

Fine.

Where a fine is to be proved with proclamations, the proclamations must be examined with the roll. *Ibid.* *Allen.* 13. *Clay* 51.; and an office-copy of it, with the proclamations indorsed, is the best.

Recoveries.

As to recoveries. When you shew a modern recovery, you must prove seisin in the tenant to the *præcipe*. In an ancient recovery seisin will be presumed, especially where possession has gone agreeable to it ever since. 1 *Mod.* 117. *Vide Stat.* 14 *Geo.* 2. c. 20. *Vide 2 Str.* 1109.

Bill and answer.

An answer to a bill in Chancery is evidence against the defendant, but the bill and answer must be read from an office-copy (ingrossed now on proper stamps, and sworn to be examined by the originals). The office-copies of depositions are evidence in Chancery, but not at common law, without examination. *Bull.* 225, 231, 233, 234. A decree may be given in evidence between the same parties or any claiming under them, 2 *Mod.* 231; but cannot be read without the bill and answer. *Dougl.* 580.

Affidavit.

An affidavit made in any cause, proof of such cause depending, and that such affidavit was used by the party, would perhaps be sufficient proof of its being sworn, 1 *Show.* 397. *Qu.* If his hand-writing should not be proved.

As to proving the issuing of a writ.

To prove that a writ issued in a particular cause, it is not sufficient to prove the *præcipe* by the filacer's book, and to give notice to the party to produce it; it should be shown that after the return, the treasury was searched, and no such writ found, and that it was in the party's hands who had notice to produce it, 4 *Esp. N. P. Cases*, 160. *Edmonson v. Plaisted, gent. one, &c.* in an action for penalties for practising without a certificate.

Postea no evidence of a verdict.

The barely producing the *postea* is no evidence of the verdict, without shewing a copy of the final judgment; because it may happen the judgment was arrested, or a new trial granted. But it is good evidence, that a trial was had between the parties, so as to introduce an account of what a witness sworn at that trial, who is since dead. *Pratt, C. J. Str.* 162. *Pitton v. Walter.*

Probate, &c.

A probate of a will, or letters of administration under seal, is good evidence as to the personal estate. *Bull.* 242. *ide Ray.* 405. 1 *Sid.* 359. without further proof.

The rolls of a court baron are evidence ; for they are the public rolls by which the inheritance of every tenant baron is preserved. *Bull.* 243. Rolls of court

The register book itself of christenings, marriages, and burials, is good, or a copy of it (copied exactly) examined by the original. *Ibid.* *Cro. Eliz.* 411. *Moor*, 451. Register.

A copy of the admission to a copyhold estate is good evidence, 2 *Barn.* 406; examined by the court rolls. Admission.

In all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted, but not where it comes in collaterally. *Bull.* 291. General character.

In every issue the affirmative is to be proved ; but when so proved, the other side may contest it with opposite proofs. But to this rule there is an exception of such cases, where the law presumes the affirmative contained in the issue. *Bull.* 293. In every issue affirmative to be proved.

No evidence need be given of what is agreed by the pleadings. *Ibid.*

If the substance of the issue be proved, it is sufficient. *Co. Lit.* 282. *Hob.* 53, 55. 2 *Roll.* 706. Substance of the issue.

If brief is in an ejectment cause, follow these rules : Ejectment.
1. Begin with the person seized in fee of the premises under whom the lessor of the plaintiff claims, deduce the title from such person so seized, setting forth the dates and contents of the conveyances, and state how they are executed, whether by livery of seisin or by inrolment, by lease and release, or by fine and deed of uses : if in by purchase, prove the deed.

If witnesses are dead, prove they are so, and the handwriting, with that of the grantor. If not an old title, prove the person seized and in possession, whom you claim under. If witnesses are dead.

2. Though the common way is to call but one witness to prove a will, yet that is only where there is no objection made by the heir ; for he is entitled to have them all examined, but then he must produce them : for the devisee need produce only one, if that one prove all the requisites. *Buller*, 264. But he must prove the handwriting of the other two also. *Esp. N. P. Cas.* 1 v. 391. If claim by will.

3. If plaintiff is in by descent, prove the ancestor seized in fee under whom you claim, set forth and prove pedigree, which is generally put in the brief, that counsel If by descent.

may comprehend it without perplexity : also set forth defendant's title so far as you have knowledge, with observations.

Lessor must prove defendant in possession.

The lessor of plaintiff must prove the defendant in possession of the premises he seeks to recover, although the defendant has entered into the general consent rule to confess, &c. 7 *Term Rep.* 327.

Fine.

An actual entry must be proved to avoid a fine. 7 *Term Rep.* 727.

Legal title.

The party having the legal title must prevail. 8 *Term Rep.* 2.

As to the production of deeds, notice must be given if in the hands of party or attorney.

If deeds, &c. are in possession of the opposite party, his attorney, or agent, a notice should be given to produce them, *Peake's Evi.* 97, 107, 191, 2. And even in penal actions, it is not necessary to give the notice to the defendant himself; notice to his attorney or agent being deemed sufficient. 3 *T. R.* 306. 5 *Esp. Ca. N. P.* 46. as

In trover.

to the time when the notice should be given. In trover for a bill of exchange, the defendant must have notice to produce it, or the plaintiff may go into evidence of the being in the defendant's possession, 1 *Esp. Cas. N. P.* 50. *Cowan v. Abraham.* The giving of notice to produce deeds, &c. must

The notice must be proved.

be proved at the trial, before the party can insist on the production of them : it is not sufficient that the attorney admits the receipt of the notice, *ibid.* 216. *Read v. Passer.*

So of books.

Ld. Kenyon. And where no notice has been given to produce books, if the party giving it call for and inspect them by a rule of court, it does not make them evidence for the other party, to whom they belong. *Ib.* 210. *Sayer v. Kitchin.*

In trover for bonds which were described in declaration, it was held that plaintiff may give parol evidence of it to support the general description, without having given the defendant previous notice to produce it, as the nature of the action gives sufficient notice to defendant of the subject of inquiry, to prepare himself to produce it, if necessary for his defence. *Howe and another ex dem. v. Hall*, 14 *East.* 274. and see 1 *Comb. N. P. Cas.* 243. *Jolley v. Taylor*, 3 *Bos. and Pull.* 143. *Bucker v. Jarrat*, which case overrules the case of *Cowan v. Abrahams*, in *Esp.* 50.

For evidence necessary in actions of *assumpsit*, and notes, vide my *Modern Pleader*.

OF THE POSTEA.

THE postea is the return of the judge before whom the Postea, what. cause was tried of what was done in the cause, and is indorsed on the back of the *nisi prius* record, by which the cause was tried. It begins, *Postea die et loco*, &c. which is the reason why it is so called. So is a nonsuit entered on the back of record.

When the cause is tried at the sittings in London or Middlesex, the associate delivers to the attorney of the party for whom the verdict has been given, the record, *distringas*, and panel of jurors with the verdict indorsed thereon; or if the plaintiff be nonsuited the nonsuit is indorsed on the panel, and the attorney afterwards indorses the postea from the associate's minute on the back of the panel. If cause tried in London or Middlesex.

But when the cause is tried at the assizes, the associate keeps the record, until the four days are expired in the next term; and if no motion is made for a new trial, he delivers it over with the *postea* indorsed, to the party obtaining the verdict. His fees are paid at the assizes. I believe the records are kept by the clerk of the assize, who I think appoints the associate. Associate in the country causes.

The court fees are about 2l. 18s. 6d. for the plaintiff's verdict; on a nonsuit about 2l. 1s., defence 1l. 18s. (a)

No judgment given either for plaintiff or defendant, upon a writ of *nisi prius* or *inquiry*, can be entered until the expiration of four days, exclusive of the entry of a rule for judgment. N. on R. E. 5 Geo. 2. Reg. 3. The four days are computed exclusive of that day on which the rule was entered, and of that on which the judgment was signed. 3 Salk. 212. (b) When judgment may be signed.

(a) If there be a nonsuit, the defendant pays the jury. Lill. P. R. 471.

(b) There must be four clear days. If the rule be given the 6th, and judgment signed the 11th, if a *Sunday* intervenes, it is too soon. *Roberts v. Stacey*, 13 East, 21. The rule for judgment may be given within four days after the end of the term, exclusive of one day and inclusive of the other.

Rule for judgment.

Upon the return day of the *distringas*, give a rule for judgment on the *postea*, which enter at the clerk of the rules, and is given on a slip of paper thus: A. B. against C. D. "Rule for judgment on *postea*;" pay 3s.; this is a four-day rule in full term (*Sunday* or a *dies non* is not to be accounted, 11 *East*. 272. *Walker v. Beaumont*); and in case the rule be entered on the last day of term, or after, then *Sunday* is no day. At the expiration of four days exclusive after entering such rule (*Sunday* or a *dies non* not intervening), judgment may be entered. See 13 *East*. 21. *Roberts v. Stacy*. N. on R. E. 5 *Geo*. 2. Within which four days the party against whom the verdict passed may move the court in arrest of judgment, or for a new trial; if neither of these be done, stamp the *postea* with a 10s. stamp: get the *postea* marked *deliberatur* with Mr. Smith, the clerk of the common bails, pay him 6d. take same to the master, who will tax the costs *de incremento*, and sign final judgment, then take out execution.

If a verdict be taken by consent, subject to the award of an arbitrator as to the quantum of the demand; this rule is necessary to be given. 4 *East*. 310. *Hayward v. Ribbans*.

If tried in term.

If the cause be tried the day before the last day of the term, a rule for judgment may that day be given, if the proceedings be by bill; and if defendant means to arrest the judgment, he must move it on the last day of that term.

But if it be tried the sitting after term, such rule cannot be given till the first day in *full term* of the next term; for all judgments must be given in the term *sedente curia*.

Death of either party.

If either of the parties die, execution cannot be taken out upon the judgment, till a *sci. fa.* sued out, and judgment thereupon obtained. *Stat*. 8 & 9 *W*. 3. c. 10.

Rule ought not to be entered before day in bank.

The rule for judgment ought *not* to be entered *before the day in bank*, and is not necessary if the plaintiff be nonsuited; for in that case, judgment may be entered immediately after the day in bank. N. on R. E. 5 *Geo*. 2. *Reg*. 3.

If by original on return day of *distringas*. Bankrupt.

If the action be by original, the rule for judgment may be given on the return day of the *distringas* (if it does not happen on a *Sunday*), if cause be tried *in the term*; but if the cause be tried the sittings after term, then on the first day of the next term, and not before.

If plaintiff become bankrupt between interlocutory Bankrupt. and final judgment, yet final judgment may be entered in the name of the plaintiff, but execution cannot issue without a *scirefacias*. 2 *Wils.* 358.

If there be a verdict for defendant, and no rule for judgment be given for four terms, a term's notice in this case is not necessary of your intention to proceed by giving the rule. But you may give the rule of course, and sign judgment after the four days are expired, for there is no act for the other party to do. Per *Master Forster*. If verdict be for defendant, and no rule given for four terms.

If the *postea* be wrong, it may be amended by the plea If *postea* be wrong. toll, by the memory or notes of the judge, or by the notes of the associate, or clerk of assizes; 1 *Ld. Ray.* 138. where the court refused to increase the damages after a distance of time, although the jury made an affidavit. 2 *Term Rep.* 281. (a)

By stat. 43 *Geo. 3. c. 46.* After 1st of *June*, 1803, in all actions wherein defendant shall be arrested and held to special bail, and wherein plaintiff shall not recover the amount of the sum for which he shall have been so arrested and held to special bail, such defendant shall be entitled to costs of suit to be taxed; provided that it shall be made appear to the satisfaction of the court, upon motion to be made in court, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount, and provided such court shall thereupon by a rule or order direct that such costs shall be allowed to defendant, and the plaintiff shall upon such rule or order being made, be disabled from taking out execution for the sum recovered, unless the same shall exceed, and then and in such sum only as the same shall exceed the amount of the taxed costs of the defendant; and in case the sum recovered shall be less than the amount of the costs of the defendant to be taxed, that then defendant shall be entitled, after deducting the sum recovered by plaintiff from the amount The defendant entitled to costs where plaintiff shall not recover sum for which he was arrested. Condition on which such costs shall be allowed.

(a) After verdict in ejectment for a messuage and tenement, court gave leave to enter the verdict for the messuage only, pending a rule to arrest the judgment, without obliging the lessor of the plaintiff to release the damages. 8 *East.* 357. *Goodtitle v. Otway.*

of his costs so to be taxed, to take out execution for such costs, in like manner as any defendant may now by law have execution for in any other cases. *Sect. 3.*

Where costs
have been
allowed.

Upon this statute, the defendant was allowed his costs where the plaintiff arrested him for the price of coals considered as full measure; the plaintiff having previously to the arrest, compounded a penal action for delivering the same coals, as being short of measure. *2 Smith's Rep. 261.* And where a verdict was taken for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide the event of the award, and the arbitrator found a less sum to be due than that for which defendant was arrested; the court held, that the sum so found, and for which judgment was afterwards given, was to be considered as a sum recovered within the meaning of the act, so as to entitle the defendant to apply for costs. *Neale v. Porter, T. 44 Geo. 3.* But where the defendant pays money into court upon the common rule, a less sum than he was arrested for, and the plaintiff takes it out of court, the statute does not apply to this case, *1 Smith's R. 428. 2 Smith, 667.* And the court will not make an order upon this statute, where it appears that under the circumstances, the plaintiff had a reasonable or probable cause for the arrest to the full amount. *1 Smith's R. 521.*

Where no
costs.

If there be a
probable
cause.

How to pro-
ceed.

If the defendant apprehends that he is entitled to costs where the plaintiff does not recover the amount of the sum he was held to bail for, he may apply to the court upon an affidavit, (a) stating that he was arrested on a writ of *latitat*, issued out of this court, and held to bail for 40l. (the sum sworn to, annexing an office copy of the affidavit of debt), and that he put in special bail thereto, and that the cause came on to be tried in ——— term last, when a verdict was found for the plaintiff to the amount only of 15l. (state if you can, that by evidence adduced on behalf of the plaintiff, it appeared that only such sum was due to the plaintiff), for a rule to shew cause why he should not be allowed his costs under the *stat. 43 Geo. 3. c. 46. s. 3.* together with his costs of this application, to be taxed by the master, and in the

(a) The judge's book should be ordered down, if tried before Lord *Ellenborough*, so mentioned by the court in *Trin. term, 1811.*

mean time proceedings be staid ; draw up the rule at the clerk of the rules ; pay according to length, serve copy on plaintiff's attorney, shew the original rule, then make affidavit of the service, give same to counsel, with one guinea to make it absolute ; if made absolute, draw up a rule at the clerk of the rules, and get an appointment thereon, serve copy on plaintiff's attorney, and attend the master to tax the costs. In this case, if the plaintiff's particular of his demand appears to be less than the sum he arrested defendant for, that fact may be stated in the affidavit, as well to obtain the rule to shew cause. The defendant in this case should shew to the court all he can to obtain the rule to shew cause ; but it appears to me that the *onus* lays on the plaintiff to shew a *probable cause* for the holding him to bail for more than he recovers, and which the court will expect.

I should think that if the cause was tried at the assizes before any judge not of this court, that judge should be called on to make his report to this court, the same as in the case of a new trial.

TAXING COSTS.(b)

If there be extra costs, an affidavit of expences, is necessary to be made before taxation : in country causes, affidavits are generally made, and if sworn there, must be filed with the clerk of the rules first, who makes a copy for the master, pay him 8d. per sheet besides duty. Extra costs.

Ordered, that all affidavits sworn before a commissioner in the country, to be brought to the clerk of the rules, to be filed in such convenient time that copies of them may be made and delivered to the party filing the same. R. M. 9 Geo. 2. Affidavits sworn in the country, to be filed before read.

It is usual, amongst fair practisers, to give the opposite side notice of taxing costs, without a rule ; but if not, he may apply to the clerk of the rules for one to be present ; pay 6s. 6d. serve copy on the attorney of the other side ; he cannot tax them without notice, if there be a rule, which is to be given the preceding evening. Rule to be present.

(b) Taxing the costs is the act of the court ; though they be taxed by the secondary of the office, for he is but the officer of the court, deputed for such purposes by the court.

cause days. And this deponent further says that he attended the trial of this cause as the attorney thereof, and that he was necessarily absent from his place of abode on occasion of his attending this cause as aforesaid days, and that he attended at the said assizes as an attorney in other cause, and that his place of abode is distant from aforesaid miles. And this deponent says, that he delivered a brief in this cause to Mr. and paid him for his fee therewith the sum of l. and another brief to Mr. and paid him for his fee therewith the sum of l. and that he also paid the following court fees, that is to say :

And this deponent further says that the several sums of money following have been paid to and for the said witnesses, that is to say,

Names of Witnesses.	With Subpoena.	For travelling Charges and for Expences at the As- sises.

The court refused to stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. *Vanbryner v. Wilson*, 9 East, 321.

VERDICT.

A VERDICT, *vere dictum*, is either *privy* or *public*. A *privy verdict*, is when the judge hath left or adjourned the court; and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court; which is of no force unless afterwards affirmed by a public verdict given openly in court, wherein the jury may, if they please, vary from their verdict. But the only effectual and legal verdict is the *public verdict*, in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought. In case the judge hath adjourned to his own lodgings, and there receive the verdict, it is a public verdict. *Co. Litt. 227.*

Public verdict.

Special verdict.

Sometimes if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attained, will find a special verdict, which is grounded on the stat. *W. 2. 13 Ed. 1. c. 30. s. 2.* whereby it is ordained, that the justices assigned to take assizes, shall not compel the jurors to say precisely, whether it be *disseisin* or not, so that they do shew the truth of the deed, and require aid of the justices. But if they of their own head will say, that it is *disseisin*, their verdict shall be admitted, at their own peril, and herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, "*that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant.*"

Special verdicts, counsel to subscribe the points.

By rule, *M. 1654. sect. 20.* In finding of special verdicts where the points are single, and not complicated, and no special conclusion, the counsel (if required) do subscribe the points in question, and agree to amend the omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment.

Deeds to be found according to the substance.

That unnecessary finding of deeds *in hæc verba*, where the question rests not upon them, but are only derivation of title, to be spared, and found shortly according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. *Ibid.*

Where there is a special verdict or case at the sittings, it should be dictated by the court, and signed by the counsel, before the jury is discharged. If in settling it, any difference arises about a fact, the opinion of the jury is taken, and the fact is stated accordingly. They must now be set down in the paper for argument within four days, and argued in course as they stand; they cannot be put off but upon motion made a day or two before, for reasons appearing by affidavit (if necessary), and upon motion made a day or two before. 1 *Burr.* in preface, p. 6.

The jury must find facts, and not evidence of facts. The court can intend nothing but what is found in a special verdict. 1 *Wils.* 55. *Hob.* 262. 2 *Stra.* 1185. (a)

If there be a special verdict found, the plaintiff's attorney generally gets the same drawn and settled by his counsel, who signs the draft, then delivers it over to the opposite attorney, who gets his counsel to sign it; when both have signed, it is then left with the clerk of the *nisi prius*, in a town cause; or with his associate, in a country cause, who makes copies for each party; the whole proceedings are then entered in form on the roll, docketed, and filed of record; after this move for a *concilium*, take *concilium paper* to the clerk of the rules, who draws up the rule for counsel to be heard; pay 6s. 6d. take same again to the clerk of the papers, he will enter the cause upon producing the rule, pay 1s. serve same on the attorney for the defendant.

Copies of the whole record and special verdict are to be made for the judges, the plaintiff's attorney to deliver two to the chief justice and senior judge, the defendant's attorney to the two other judges, before argument. (b) Also counsel must have their briefs, with a copy of the whole record and special verdict. Rule, *E. 2 Jac.* 2.

Be the verdict in whose favour it may, the rule of court is drawn up and costs taxed immediately, without a rule

Special verdict or case, how settled and to be set down.

How to proceed.

The concilium is moved for in the same manner as on demurrer.

To be delivered to the judges in two days.

Of taxing costs.

(a) Where it concludes *generally*, the whole case must appear on record. 2 *T. R.* 666. *Rex v. Calder Navig.*

(b) The rule of *Trin.* 40 *Geo.* 3. is to be attended to as to the delivery of the books to the judges. See title *Demurrer*.

being given for judgment, there being a special rule for the *postea* to be delivered to the successful party, and execution may issue thereon. But the other party may have a rule to be present at the taxing of costs, as in other cases.

If counsel do not agree in statement of facts.

If the counsel cannot agree in the statement of the facts, application may be made to the judge to state them according to his minutes, by summons.

When special verdicts are to be set down.

Special verdicts are to be set down to be argued within the first four days of the term, otherwise it must be mentioned specially to the court, on the motion for a *concilium*. See 1 *Burr.* in pref. 6.

Special case.
Barn. 460.

SPECIAL CASE.

ANOTHER method of finding a species of special verdict, is when the jury find the verdict generally for the plaintiff, but subject nevertheless to the opinion of the court above, on a special case stated by the counsel on both sides with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expence, and obtains a much speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law. (a)

How to proceed.

If a special case is made, it is settled by the two counsel and signed, give same to the honourable *Charles Lee*, the clerk of the *nisi prius*, if a town cause (country cause to the associate,) who will make copies for each party, move for a *concilium* by counsel, pay for rule 6s. 6d. get the rule from the clerk of the rules, then set the cause down with the clerk of the papers, and proceed the same as on a *special verdict*; copies for the judges are also to be delivered in the same manner as on demurrers.

(a) In arguing a special case, the counsel are not permitted to go out of it, and the court must judge upon it as stated. 1 *Burr.* 617.

Ordered, that all special cases to be set down by the clerk of the papers to be argued, shall be entered within the first four days of the next term after the trial, at which such special cases shall have been reserved. And further that such special cases shall never be set down for argument, on any of the four last days of the term. *R. M. 38 Geo. 3.* When special cases are to be set down.

If the case be insufficient, and a new trial granted, the court will not give costs of the first trial. *3 Term Rep. 507. Hankey v. Smith.* But if defendant after the second trial awarded, give a cognovit previously, he is liable to the costs of the former trial. *6 Term Rep. 144. Booth v. Athelston.* Costs. If cognovit.

In a case for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of the fact only: thus in trespass on a copyhold, it is not enough to state that the admission of plaintiff was proved, but must state that plaintiff had title or possession. *2 Wils. 163. Palmer v. Johnson.* What it ought to state.

The court will judge only on the case as stated; if misstated, you may apply to amend it. *1 Burr. 617. Doe v. Lewis.* If the case be so defective that the court are not able to give judgment, they will grant a new trial. *1 Str. 800. 3 Term Rep. 507.*

This court will not take cognizance of a special case reserved upon the trial of an indictment at the sessions. *13 East, 75.*

But it has been usual to reserve special cases upon convictions and for penalties on an appeal at the sessions, as well as in cases of settlement, and the court will take cognizance of them where accompanying the proceedings removed by *certiorari* into this court. *Rex v. Allen, 15 East, 333.*

ARRESTING THE JUDGMENT.

Arrests of judgment arise from *intrinsic* causes, appearing upon the face of the record; for a judgment can never be arrested but for that which appears on the face of the record itself. *Lord Ray. 232. 4 Burr. 2287.* After judgment on demurrer, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer; the reason is that the matter of law, having been already settled, the court After judgment on demurrer.

will not afterwards suffer any one to tell them, that the judgment they gave on mature deliberation, is wrong; but it is otherwise after judgment by default. *Edwards v. Blunt*, 1 Str. 425.

No motion without roll or *postea* be in court.

It is said no counsel ought to move any thing in arrest of judgment, except the roll wherein the judgment is entered, or the *postea* be in court. 2 *Lill. Pract. Reg.* 120. 1 *Salk.* 78. *Mod. Cas.* 24. But it seems that this is not the practice, the rule is made generally, "to shew cause why the judgment should not be arrested." Nor is there occasion to produce the inquisition, on an inquiry, on the motion.

When it may be moved.

The rule expired on *Monday*, and the court held that defendant had till next day, *Tuesday*, to move, *Sunday* being no day. And the practice is the same on the crown side. 4 *Burr.* 2130. in memorandums.

After conviction.

With respect to this motion on the criminal side, see *Rex v. Holt*, 5 *Term Rep.* 445. and *Rex v. Franklin*, stated in 455, which cases contradict each other, the former stating it may be moved at any time before judgment pronounced, the other within the four days.

Distringas.

If the inquisition or *distringas* be returnable the last day of the term, the motion must be made on that day. *Lill. Pract. Reg.* 120. Note on Rule, *East.* 5 *Geo.* 2. *Reg.* 3.

May be made before judgment signed.
Costs.

It is now determined, that this motion in actions may be made at any time before the judgment is signed. *Doughl. Rep.* 746. *Taylor v. Whitehead*, and after motion for a new trial is discharged. (a) *Ibid.* 1 *Burr.* 334.; and if the judgment be arrested, each party pays his own costs. *Cowp. Rep.* 407.

Not to be made till demurrer determined.
Without notice.

A motion in arrest of judgment cannot be made till demurrer determined, though there be a verdict on the issues. *Andr.* 282.

This motion is made without notice to the opposite party, and it is a rule to shew cause; fee not less than a guinea to counsel.

(a) In such case, it is usual for counsel, upon obtaining a rule for a new trial, to pray leave of the court, if that rule be discharged, to follow it by a motion in arrest of judgment, otherwise he may not have an opportunity to move in arrest of judgment in time.

The plaintiff, on an issue tendered by the defendant, joined the issue thus: "*and the aforesaid defendant doth the like*," the judgment was established, though objected to. 4 *Burr.* 1793. *Harvey v. Peake.* 2 *Str.* 117. *Crompt.* 376. *contra.*

Judgment shall not be stayed after verdict by reason of mistaking the names of the plaintiff and defendant. Mistake in names. *Stat.* 16 & 17 *Car.* 2. c. 8. 1 *Black.* 40.

If defendant's name be put in two counts, instead of plaintiff's, court will not arrest the judgment. 3 *Wils.* 43. *Richards v. Symonds, Com.* 557. If defendant's name inserted instead of the plaintiff's.

The court after verdict will do every thing they can to help the declaration, 2 *Burr.* 899, 1 *Salk.* 29; and will suppose every thing proved at the trial which was necessary, unless the contrary appear on the record. 1 *Wils.* 255. *Bull v. Steward.* But not after judgment by default. 2 *Burr.* 899. *Collins v. Gibbs.* After verdict.

After verdict, a man may allege any thing in the record, in arrest of judgment, which may be assigned for error after judgment. 2 *Roll. Abr.* 716. And judgment after verdict, shall not be arrested for an objection that would have been good on demurrer. 3 *Burr.* 1725. *Weston v. Chapman, Str.* 425.

A verdict will aid a title defectively set out, but not a defective title. 2 *Str.* 1011, 1023. 1 *Burr.* 301. 2 *Burr.* 1159. 4 *Term Rep.* 472. *Vide also Doug.* 679. 683. Verdict will aid title.

If the rule be discharged, then plaintiff's attorney draws up the rule, and may proceed to tax his costs in the usual way on the *postea*, or *inquisition*. If rule discharged.

If judgment be arrested, the defendant's attorney draws up the rule, and serves copy. *Cowp.* 407. If arrested.

If the defendant does not move in time, he still may bring his writ of error.

It is a rule that the defendant cannot move in arrest of judgment, for any thing that he might have pleaded in abatement. 2 *Black. Rep.* 1120.

If there be a misjoinder of counts, and a verdict for the plaintiff on the counts well joined, and for the defendant on the others, the misjoinder is not a cause for arresting the judgment. *Kightly v. Birch, 2 Maule and Selw.* 533. Misjoinder not a cause for arresting the judgment.

NEW TRIAL.

Venire de novo when may be granted.

How motions for new trials were introduced.

Ven. fac. de novo.

When a new trial cannot be moved.

As to a general verdict.

NEW trials were granted before 1655. *Sty.* 462. 466.(a) A *venire de novo* is the ancient proceeding of the common law, a new trial is only a new invention: the first is as ancient as the law, when attaints were in use; but motions for new trials were introduced in this manner; the judgment in attaint was very severe, and the punishment excessively hard, and therefore to avoid that severity, it was thought better to proceed in a milder way, and so motions for new trials were introduced; they likewise differ in this respect, that new trials are generally granted where a general verdict is found; a *venire facias de novo* upon a special verdict; but the most material difference between them is this, that a *venire facias de novo* must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it, if the record be never so right. If the verdict appear contrary to the evidence given, or the judge has given wrong directions, a new trial will be granted; but it is otherwise as to a *venire facias de novo*, which can only be granted in these two cases: 1st, If it appear upon the face of the verdict, that the verdict is so imperfect, that no judgment can be given upon it. 2d, Where it appears that the jury ought to have found other facts differently; and it cannot be granted in any other case. *Ld. C. J. Willes. Leybourn v. Lewis*, 1 *Wils.* 55. It is a general rule, that the party shall not move for a new trial, after he has moved in arrest of judgment. 1 *Burr.* 334. 2 *Salk.* 647.

A general verdict can only be set right by a new trial, 1 *Burr.* 393. Most general verdicts include legal consequences as well as propositions of fact: in drawing these consequences, the jury may mistake and infer directly contrary to law: the parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of

(a) In a civil case granted in the time of *Ed. 3.* 6 *Term Rep.* 623, 3.

reconsidering the cause, by a new trial : and it is done in a way very favourable to the parties for whom the wrong verdict is given ; it is upon payment of costs : whereas in other cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance. Lord Mansfield, *Bright v. Eynon*, 1 Burr. 393. The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances. Of late years, they have been granted after trials at bar. *Ibid*, 395. It must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice. *Ibid*, 397. Trials by jury in civil causes, could not subsist now, without a power somewhere to grant new trials. 1 Burr. 390. Costs. (a)

Discretionary.

Though a motion for a new trial is an application to the discretion of the court, it must be remembered, that the discretion to be exercised on such an occasion, is not a wild but a sound discretion, and to be confined within those limits which an honest man, competent to discharge the duties of his office, ought to confine himself. And that discretion will be best exercised by not deviating from the rules laid down by our predecessors ; for the practice of the court forms the law of the court. Lord Kenyon, *Wilson v. Rastall*, 4 Term Rep. 707. The discretion of the court to be a sound one.

Where parties have agreed to abide by the verdict in one action, (where several are depending,) it means such a verdict as the court thinks ought to stand as a final determination, and this therefore, does not prevent a motion for a new trial. *Hodgson v. Richardson*, 3 Burr. 1477. Many actions to abide the event of one.

It may be had in an information on a *quo warranto*. *Res v. Francis*, 2 Term Rep. 284. On a quo warranto.

So after a nonsuit, if improperly directed. 4 Burr. 1886. *Sadler v. Evans*, 5 Burr. 2612. *Rich v. Shute*. Nonsuit.

If a nonsuit be set aside upon payment of costs, such If a nonsuit be set aside on payment of costs, such costs must be paid before the next trial.

(a) As to the costs after a *venire de novo*, awarded upon an imperfect special verdict, and new trial granted, see *Bird v. Appleton*, 1 East, 111. If there be a third trial the party succeeding is only entitled to the costs of that trial. *Ibid*, 114. See 8 Term Rep. 619. *Austen v. Gibbs*.

payment must be made, *before the plaintiff can proceed again to the trial*, being a condition precedent; and if the plaintiff go to trial and leave the costs unpaid, although he obtains a verdict, it will be set aside with costs. *Nicholas v. Bozen*, 13 East, 185.

New trial,
what.

A new trial is retrying the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken in the former verdict on the one side, or the rule of court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury, who had they possessed the same lights and advantages, would probably have altered their own opinion. Nothing is now tried but the real merits of the case. A sufficient ground must, however, be laid before the court, to satisfy them, that it is necessary to justice, that the cause should be further considered, nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case.

Sufficient
ground must
be laid before
court.

In criminal
cases when
moved for.

If the defendant do not move for a new trial in a criminal case within the four days, he cannot be heard at all on the subject of a *new trial*; all that he can do is, to move in *arrest of judgment*, which may be done at any time before judgment is pronounced, or address himself to the court in mitigation of the punishment; and if, in the course of that address, it incidentally appear that justice has not been done, the court will interpose of themselves. *Rea v. Holt*, 5 Term Rep. 445.

If judge dies.

And it seems if a judge dies between the circuit and the following term, motions for new trials are to be made upon affidavit. *Ibid.* 439. Lord Kenyon.

In assault and
battery.

In assault and battery, the evidence was, that plaintiff, who was a servant to the defendant, after having received a slight blow from his master for impertinent behaviour, violently beat him.—Verdict 40l. The court granted a new trial as being excessive. *Jones v. Sparrow*, 5 Term Rep. 257.

For want of
due notice,

The want of due notice of trial, unless the defendant makes a defence, is a good ground for a new trial; but contrary if he appears and defends. *Thermolin v. Cole*, 2 Salk. 646.

It is not sufficient that the cause is of value or importance, but it must involve in it *a doubt*. The suitors frequently derive great benefit from having their causes thoroughly investigated on such motions; for it often happens by some accident, that complete justice is not done at *nisi prius*. *Per Grose, J. 2 Term Rep. 120.* As to value.

It may be granted a second time, if the reasons for granting it be sufficient. *4 Burr. 2108. Goodwin v. Gibbons.* When it may be granted a second time.

So a third trial if verdict be against law. *1 Term Rep. 167.* So if against evidence. *Wilson v. Brough, E. 24 Geo. 3. Salk. 50.* When a third time.

So in ejectment and after a trial at bar. *4 Burr. 2224. Str. 1105. Smith v. Parkhurst.* So in ejectment and after trial at bar.

So if a jury toss up for the verdict, and that can be made appear by a third person seeing them. *1 Term Rep. 11. Str. 642. see 2 Black. 1293.* If jury toss up.

So if an under-sheriff be attorney in the cause, and return the panel of the jurors. *Cowp. 112. Baylis v. Lucas.* Under-sheriff.

If a verdict arise from a slip or inadvertence, as the want of producing the office copy of a judgment, and where the plaintiff has no merits, such recovery is manifestly contrary to reason and justice, and new trial granted. *Martin v. Podger, et al. 5 Burr. 2631.* If verdict be from a slip or inadvertence.

If a witness be concealed in plaintiff's house, to avoid being served with a subpoena, though plaintiff has a verdict, court will grant a new trial. *Montpesson v. Randall, Bull. N. P. 328.* If witness be concealed.

In *Ducker v. Wood*, Lord Mansfield said, that there was no doubt, but that the court had the power of taking the opinion of a second jury, in any case where the damages were excessive; but these questions depended on their own circumstances, on which the court would exercise their own discretion. *2 Term Rep. 277. See 2 Wils. 405. 4 Wils. 62.* Court have power to grant, &c. where excessive damages.

In an action for diverting a watercourse, and 3000l. damages, court granted a new trial, being excessive. *7 Term Rep. 529. Pleydell v. Lord Dorchester.* For excessive damages.

But the former verdict was ordered to stand as security in the mean time, for the damages which might be given; and the court said, "it was fit to be enforced, not only upon this, but on all future occasions of this kind." See *Sty. Rep. 466. Wood v. Gunston, M. 1655.* It seems to be the ancient rule. Former verdict to stand as a security, and the rule to be enforced.

After error brought.

See 1 B. & P. 149. *a.* where a new trial was granted after error brought on the first day of the term, and held to be no objection, as a point of importance was depending, which would have been shut out in the court of errors. *Hammet et al. v. Hea, Bar. C. P.*

All the defendants must be present when moved for.

The presence of all the defendants convicted of an indictment for a conspiracy is necessary, in order to move for a new trial on behalf of any of them. *Rex v. Askew and others, 3 Maule and Selw. 9.*

The bare circumstance of a witness being discovered to be incompetent *after* the trial, is not sufficient ground for a new trial. 1 T. R. 719.

When not granted.

Felony.

In case of felony no new trial can be granted. 6 Term Rep. 638. But for a misdemeanor it may, *ib.* 5 Term Rep. 619.

Three issues and two found.

If out of three issues two are found against evidence, yet if the material issue be agreeable to evidence, no new trial. *Dexter v. Barrowby, Bull. 326. Vide Rex v. Pool, ib.*

If against evidence, and action frivolous, will not grant it.

So if a verdict is against evidence, yet if the action was frivolous and vexatious, and the real damage small. 1 Burr. 11. *Mackrow v. Hull.*

When not for excessive damages.

Nor for excessive damages, when they depend on circumstances solely under the cognizance of the jury, and fit for their decision; as for crim. con. 1 Burr. 699. *Wilford v. Berkeley, 4 Term Rep. 657. Duberley v. Gunning.*

Nice or formal objections.

Nor on nice or formal objections, which do not go to the real merits.

No instances of new trial on account of witnesses being interested;

There has been no instance of this court's granting a new trial on an allegation that some of the witnesses examined were interested. There never yet has been a case in which the party has been permitted after trial to avail himself of any objection, which was not made at the time of the examination. Where it appears that one or more material witnesses who were examined on a trial were interested, it may afterwards weigh with the court as a circumstance for granting a new trial, provided the merits of the case are doubtful; but as a substantive objection, it ought not to be allowed. *Per Buller, J. Turner v. Pearle, 1 Term Rep. 720.*

unless the merits are doubtful.

New trials are never granted where it appears that the party might have produced and given material evidence at the trial, if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes, if once a door was opened to this. *Cooke v. Berry*, 1 Wils. 98. 1 Term Rep. 84. *Gist v. Mafson*, Salk. 697. Str. 691. 2 Term Rep. 113.

No new trial shall be, where there was evidence on both sides, though a verdict be against the judge's opinion who tried the cause. *Anon.* 1 Wils. 22.

Nor where the scales of evidence hang nearly equal. Str. 1442. *Ashley v. Ashley*.

Nor upon the affidavits of jurymen; because it would be of very dangerous tendency. Wils. 330. *Rex v. Simmons*. On affidavit of jurymen.

Where there is a bill of exceptions, a new trial shall not be moved for on the point of law contained therein. *Fabrigas v. Mostyn*, 2 Black. 929. Bill of exceptions.

Court will not admit affidavits to explain evidence, to found the motion. 1 Wils. 257. *Hanson v. Parker*. Affidavits to explain not admitted.

Where a new trial is moved for on the ground of a misdirection in point of law, if the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question. *Edmondson v. Mackell*, 2 Term Rep. 4. Misdirection of point of law.

But where there is any ground of objection to the law delivered by the judge, on which the verdict has proceeded, if such objection be well founded, it is immaterial what the nature of the cause is. The application for a new trial is a direct appeal to the justice and laws of the country, and cannot be tried and disposed of by any other rule. 5 Term Rep. 19. *Calcraft v. Gibb*. If judge be wrong in his direction.

The son of a jurymen summoned and returned, answered to his father's name, when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict, as for a mis-trial. 12 East, 229. Not even in the case of a trial for a capital felony. *Ibid.* 231. *Hill v. Yates*. If a jurymen's son be sworn instead of the father, no new trial.

It is only a matter of challenge where the verdict has passed for the defendant in a penal action, on the ground of its being against evidence, the court will not grant a new trial. *Brook qui tam v. Middleton*, 10 East, 268. In penal actions on the ground of its being against evidence.

The court will not grant a new trial in penal actions, 3 Wils. 59. *Fonereau v. Bennet*, 1 Wils. 17. *Jervis v.* In penal actions, no new

trial, unless,
&c.

Hall, 2 Str. 899.; unless on account of a mistake or misdirection of a judge; *Wilson v. Rastall*, 4 Term Rep. 753. If the jury have formed an opinion upon the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion; indictments are excepted. Lord Kenyon. See 2 Str. 1238.

If a witness
called to prove
a certain fact
was rejected.

It is no ground that a witness called to prove a certain fact was rejected, on a supposed ground of incompetency, when another witness who was called established the same fact, which was not disputed by the other side, and the defence proceeded upon a collateral point, upon which the verdict turned. *Edwards v. Evans*, 3 East, 451.

If pending
motion an al-
lowance of
error be
served.

Where pending this motion, plaintiff was served with a writ of error, court held this to be an admission of the facts of the case, and refused to grant a new trial. *Bennet v. Hunt*, T. 15 Geo. 3.

Malicious
prosecution.

The court refused a new trial where verdict was for defendant, in an action for a malicious prosecution. *Cowp. Rep. 37. Norris v. Tayler*.

Libel.

So in an action for a libel, when no real damage was proved. 2 Burr. 665. *Burton v. Thompson*.

Illegality of a
policy.

Nor will it be granted to give the defendant an opportunity of proving the *illegality of a policy*, which was not illegal on the face of it; for he should have shewn it on the trial. 1 Term Rep. 84. *Gist v. Mason*.

Nor to let the party into a defence of which he was apprised at the first trial. *Vernon v. Hankey*, 2 Term Rep. 113.

Nor suffer new evidence to be set up, after they knew what was sworn before. Str. 691.

If defendant
pays money
into court.

No new trial, if defendant, an auctioneer, in an action against him for the deposit, pays money into court. *Borough v. Skinner*, 5 Burr. 2639.

Personal torts
seldom grant-
ed.

A new trial will seldom be granted in cases of personal torts for excessive damages. *Cowp. Rep. 230*. It ought not to be granted merely for the sake of turning the party round, but where *substantial justice* cannot otherwise be obtained. *Ibid*, 601.

Inquiry.

A writ of inquiry may be set aside for smallness of damages, Str. 1259. or excessive damages.

If plaintiff re-
cover in con-
science.

Where a jury have found for plaintiff upon a *presumption contrary to evidence*, the court will not grant a new trial, if he be entitled to recover in conscience and equity. *Wilkinson v. Payne*, 4 Term Rep. 468.

It is a general rule, that in a *hard action*, where there is something on which the jury have raised a *presumption agreeably to the justice of the case*, the court will not interfere by granting a new trial, where the objection does not lie in point of law. *Buller, J.* If the verdict be *consistent with the justice, conscience, and equity of the case*, court will not grant a new trial. *Ibid.* 469, 470. S. C.

In actions on the game laws.

The court refused to grant a new trial after verdict for defendant upon not guilty to an indictment for a nuisance to a highway. And Lord *Ellenborough* observed, that the general rule is that we do not grant a new trial upon an indictment for a misdemeanor where a verdict has passed for the defendant upon the merits. This is, to be sure, in the nature of a remedy for a civil right, yet is in form a criminal proceeding, and may subject the defendant to be punished criminally. *Rex on the prosecution of N. P. Wyndham v. Mann, 4 Maule and Selw. 337.*

Not granted on indictments for misdemeanor.

When and how to move.

All new trials (in causes tried in vacation,) by the practice of this court, must be moved for *within four days in the beginning of the term, including the first day*. If term begins the 21st of April, must be moved for the 24th. *Birt v. Barlow, Doug. Rep. 470. (a)*

They are to be moved for within four days.

But a Sunday, or a *dies non*, is not to be reckoned one of the four days.

Sunday or a dies non.

It may be moved afterwards on some material circumstance which has happened, shewn by affidavit, *stating the cause of the delay*, provided judgment has not been signed.

When it may be moved for after the four days.

It is generally made on an affidavit (*unless it arises from a verdict given contrary to evidence, a misdirection of the judge at nisi prius, or where the jury have given excessive damages*).

Generally made on an affidavit.

In case the cause has been tried at any of the sittings within term, then the motion must be made *within the four days including the day the rule for judgment is entered*.

If tried in term.

Ordered, that after any rule shall be obtained for a new

Before shewing cause against a new

(a) An affidavit is necessary, unless the ground of it appears on the face of the evidence.

trial, a note is to be left with the chief justice.

trial, &c. (a) in London, or Middlesex, the attorney, for the party obtaining the said rule *nisi* shall before the time of shewing cause deliver a note in writing at the house or chambers of the chief justice, "specifying the name of the cause, and the time and place where the same was tried, together with the nature of the motion." R. M. 40 Geo. 3.

How to move for a new trial.

(b) It is a rule to shew cause, therefore unnecessary to give notice to the opposite party; draw up rule, pay 7s. 6d. and serve it, and the day before it comes on to be heard, speak to the chief justice's clerk, or judge's clerk, who tried the cause, to bring his book to Westminster; if it be a judge of another court, serve his clerk with a copy of the rule *nisi*, the judge will deliver his report to the puisne judge of the court within the time mentioned in the rule; it is better to serve the rule (though generally the puisne judge writes to the judge who tries the cause for his report, or waits on him). Search at the clerk of the rules the paper of causes set down for new trials, to see the day when it is entered to come on; make an affidavit of the service of the rule *nisi*, and of having shewn the original; give brief to counsel to make the rule absolute, with an affidavit of service (in case the other side does not attend,) fee discretionary, and if the rule be made absolute, draw up same at the clerk of the rules; pay 7s. 6d. serve a copy on the attorney on the other side.

Bull. N. P. 397.

If the rule be discharged, proceed to tax the costs on the *postea*, as in common cases.

If judge reports that he is satisfied.

If the judge on the report declares himself satisfied with the verdict, it will be difficult to obtain a new trial; on the other hand, it is pretty much of course to grant the rule. It is usual (if known) for the opposite party to attend, and observe upon what grounds the motion is made, so that he may be able to instruct his counsel to shew cause, though his attendance is not allowed in taxed costs.

If court be divided.

If the court be divided, no rule is made, but the party may apply to be at liberty to sign his judgment. *Vide Barn. 442.*

(a) &c. Means to set aside a nonsuit, or enter a verdict for the defendant.

(b) The brief on the former trial is to be given to counsel, fee discretionary, with such observations as are necessary, and copy of the affidavit, unless moved on the evidence given.

If Verdict set aside.

If the verdict should be set aside, draw up rule and serve it; and if on payment of costs, get an appointment to tax the costs, serve same, and when taxed they must be forthwith paid (the rule being conditional), or plaintiff may move the court to discharge the rule, and to be at liberty to enter up the judgment, and take out execution : if the costs are paid, then the *nisi prius* record is not to be engrossed anew, unless the *postea* be indorsed on the back ; if it is, Mr. *Provost* will not pass the record again. The *jurata* in the record must be altered, as to the return, and the record must be passed again ; but no new entries are made or paid for ; a new *venire* and *distringas* must be sued out and returned as in common cases, and cause set down a-new, and also a fresh notice of trial must be given.

If plaintiff does not proceed to a new trial, the defendant must carry record down by *proviso*, not being entitled to judgment as in the case of a nonsuit.

If a new trial is granted on account of an irregularity, costs are of course ; if by mistake of the judge in point of law, 1 *Black. Rep.* 670. or by unfair practice, no costs, 1 *Burr.* 352 : but if by mistake of the jury, or verdict contrary to evidence, or excessive damages, it is granted on payment of costs, 12 *Mod.* 370. *Str.* 642. 1 *Burr.* 12, 393, 2 *Burr.* 665. And where the costs of the former trial are not ordered to be paid, nor directed to abide the event of the suit, each party must pay his own costs, and the party ultimately succeeding is not entitled to them. *Dougl.* 437. *Mason v. Skurry.* See 3 *Term Rep.* 507. *Hankey v. Smith.*

But where a cause is twice tried, and the verdict is found on each trial for the same party, he is entitled to the costs of both ; but where verdicts are found for different parties the costs of the first is not allowed. This was in the C. P. 1 *H. Black. Rep.* 641. *Trelawney v. Thomas.* To this this court assented, 8 *Term Rep.* 619. *Austin v. Gibbs*, and held, that upon setting aside a nonsuit the costs are directed to abide the event ; though the plaintiff succeed on the second trial, he is not entitled to the costs of the first, neither is the defendant in such case entitled to the costs of the first trial.

Where a *venire de novo* is awarded, the party succeed-

G g

If *venire de novo* awarded as to costs.

ing is only entitled to the costs of the second trial. *Lickbarrow v. Mason*, 6 T. R. 131.

When costs
are allowed.

If the rule is discharged on motion for a new trial, costs on the motion are allowed, though the rule does not express it.

ENTRY OF PLEADINGS.

Of entering Pleadings on the Roll, and docketing same.

The manner
of making the
entries.

THE roll, or entry of the issue, or pleadings between the parties, is to be entered in a full fair hand, with a large margin of an inch at least, and a convenient distance at the top, for the binding up of the same, and at the bottom, that the writing be not rubbed out, *R. Hil.* 1657; and when you have occasion to write on the back of the roll, begin over against the first line of the first warrant of attorney, leaving a margin as on the other side.

When the rolls
are to be
brought in,
in each of the
terms.

The *Custos Brevium* attends at the King's Bench Office to receive the rolls of *Michaelmas*, *Hilary*, *Easter*, and *Trinity* terms, two days previous to the last day of the vacation of each term (except *Sunday* intervenes.)

If *Sunday* intervenes, then he attends three days previous, instead of two.

So that he is to have *one day* clear before each term commences, to make up the bundle. The rule of *Mich. 5 Ann.* has not been attended to for many years, the *custos brevium* having enlarged the time for accommodation of the practicers.

Rolls to be
be marked.

No rolls to be received or allowed for by the clerk of the treasury, unless *marked* by the person appointed by the chief justice to deliver out rolls. *Trin.* 12 *Geo.* 2. 1738.

Warrants of
attorney.

Warrants of attorney to be entered on the roll at the beginning of the cause, otherwise the roll not to be received or filed. *R. E.* 4 *Jac.* 2.

Where to be-
gin on the
roll.

The space or room here spoken of for the entry to be left for the press, is made by the clerk appointed to deliver out the rolls, now Mr. Adams, of Lincoln's Inn, stationer, who puts a stamp in the middle of the roll, near where the file goes through, two inches below which you enter in a large hand thus: "*Also of the term of the Holy Trinity,* 57th *Geo.* 3. 1817. *Witness Edward Lord Ellenbo-rough;*" then enter the warrants of attorney for the plaintiff and defendant, thus, and in a new line:

Middlesex, (ss.) J. D. puts in his place J. S. his attorney, against C. D. in a plea of trespass on the case. Plaintiff's warrant.

Middlesex, (ss.) The said C. D. puts in his place J. W. his attorney, at the suit of the said A. B. in the plea aforesaid. Defendant's.

The nature of the action must be expressed in the warrant of attorney, according as the case shall be, as thus: Nature of the action to be expressed.
"in a plea of trespass and assault; in a plea of trespass, assault and false imprisonment; in a plea of trespass on the case; in a plea of trespass and ejectment; in a plea of debt, in a plea of trespass; in a plea of debt."

Middlesex, (ss.) Be it remembered that (here enter the whole issue thereon.)

All issues joined are to be entered on the roll (by bill) the term in which they are joined. Issues.

All interlocutory judgments are entered on the roll (by bill) the term in which they are signed. Judgment.

Issues by original may also be entered on the roll the term in which the issue is joined, as the want of an original cannot be assigned for error after verdict. Issues by original.

But the clerk of the papers makes up the paper book of the term the declaration is of, and enters continuances to the pleadings, as they are filed in his office. But special pleadings.

But if declaration by original be of one term, and interlocutory judgment of the next, or any succeeding term, then the entry on the roll may be of the latter term, provided you get an original, *returnable the same term the judgment is signed.* 1 Wils. 181. 1 Lev. 69. 1 Keb. 327. When interlocutory judgment may be entered by original.

If judgment is signed by warrant of attorney, the entry is to be of that term you enter it up in. If the plaintiff be *non-prossed*, either for want of declaring, replying, or entering his issue, on record, you may enter both warrants of attorney on the roll. (a) No plea roll to be filed after the term following that of which it ought to be filed. R. E. 9 W. 3. unless leave be given; but now they are accepted by paying a *post terminum*, 4s. 8d. Interlocutory or other judgment, of what term to be entered.

(a) And the defendant makes his entry in all cases, the same term the *non-pros* is signed, with proper continuances to that term, if there are any, as on a *non-pros* for not entering the issue.

Of the original writ.

When all the proceedings are in one and the same term, an original in that term will warrant same; but an original of the term final judgment is given, will not warrant them, if there be proceedings of a preceding term, as an interlocutory judgment. 1 *Wils.* 181.

Post terminum.

If the roll be not carried in and filed, as of the term issue is joined, then you will have to pay a *post terminum*, which is 4s. 8d. and 1s. more for the docket; also the clerk will charge you a *post diem*, one day before the term begins, if your roll is not filed the day preceding, for he has that day to make up the bundle, therefore the roll is to be taken to him in the treasury chambers at *Westminster*.

Of Docketing Rolls.

If you wish to docket your entries the same term the issue is joined or judgment signed, then apply to the clerk of the dockets (Mr. *Clarke*, in the King's Bench office), who will give you as many numbers as you want: sign your name to the parchment roll, and put at the foot of each roll the number, thus, (Roll 500) then make out on a plain piece of paper the docket, thus:

Docket paper.

The entry of C. K. gentleman, one, &c. of the term of the Holy *Trinity*, 57 *Geo.* 3. 1812.

Roll.

<i>London.</i>	Issue joined in case between J. D. plaintiff, and <i>Richard Fenn</i> , defendant, on a plea of <i>non assumpsit</i> .	500
<i>Middlesex.</i>	The like issue in assault, between A. B. plaintiff, and C. D. defendant, on a plea of not guilty, and <i>son assault demesne</i> .	501
<i>Middlesex.</i>	The like issue in debt, between A. B. plaintiff, and C. D. defendant, on a plea of <i>non est factum</i> .	502
<i>Surrey.</i>	Judgment by default in case, between A. B. plaintiff, and C. D. defendant.	503
<i>Surrey.</i>	Judgment by confession, between A. B. plaintiff, and C. D. defendant, for 64l. debt, and 63s. costs.	504

<i>Middlesex.</i>	Judgment by <i>nil dicit</i> , between A. B. plaintiff, and C. D. defendant, for 600l. debt, and 63s. damages.	} Roll 505
<i>Middlesex.</i>	Entry of two <i>scire facias</i> 's in debt. between <i>John Doe</i> , plaintiff, and <i>Richard Roe</i> , defendant, for 1000l. debt, and 63s. damages.	} 506
<i>Middlesex.</i>	Entry of one <i>scire facias</i> , between, &c. with an award of the second for 1000l. debt, 63s. damages.	} 507
<i>Middlesex.</i>	Judgment of assets <i>in futuro</i> , between A. B. plaintiff, and C. D. executor of J. D. deceased, defendant, for 100l. debt.	} 508
<i>Middlesex.</i>	<i>Non-pros</i> , for not declaring between A. B. plaintiff, and C. D. defendant, for 40s. costs.	} 509

Take the same with your drafts of issues or judgments, as also the declaration, and paper books (if any): if the pleadings have been already entered, he will put a stamp on each roll, and on your issues, &c. if not entered, then pay for the entries, also pay 3s. for the docket, then go to Mr. *Edge*, who waits in the outer room, and give him the rolls, he pays you 4d. a roll, and files them in the treasury.

How to proceed.

But if the roll should be of a preceding term, and not docketed in time, and you want to docket same, then apply to Mr. *Edge* at *Westminster* in term time, in the treasury, who will give you same, pay him 4s. 8d., if in vacation, apply to him at his house in *Essex-street, Strand*, when obtained, make out your docket paper, and take the same to the clerk of the dockets, who will mark the roll, and enter the docket, pay him 3s. then return to Mr. *Edge*, and file the roll with him, he pays you 4d. each roll.

If of a preceding term and not docketed in time.

If the roll is already carried in, which is often the case after issue is joined, and before trial, the *postea* or inquiry, with the costs taxed thereon, is to be taken to *Westminster* to the treasury, and Mr. *Edge* on leaving it, will enter the judgment thereon; pay him 2s. for *postea*, 1s. 6d. for inquiry.

Clerk of the treasury enters final judgment.

The former roll being lost, court ordered a new one to be filed. 2 *Str.* 833.

It concerns the chief clerk that judgment be actually

When action lies for not

entering
judgment.

entered up in due time (provided the roll is docketed and filed,) or he will be liable to an action on the case at the suit of a purchaser.

If the attorney has not done his duty in docketing and filing the roll, he will be liable. 2 *Burr.* 722. *Doyles v. Yallop.*

Judgment is
not docketed,
&c.

By stat. 4 & 5 *W. & M. c.* 20. s. 3. "No judgment, not docketed and entered in the books, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators, in their administration of their ancestors', testators', or intestates' estates." This only relates to freehold.

May register
judgment.

If the defendant has a freehold estate in *Middlesex* or *York*, you may register the judgment, which will affect it from the day of the registering, (the docket should first be made.)

Memorial of
a judgment.

A memorial to be registered pursuant to the statute, &c.

Of a judgment recovered in his majesty's court of King's Bench, of *Trinity* term, in the 57th year of the reign of king *George* the third, between *John Stokes*, plaintiff, and *Richard Fenn*, defendant, in a plea of debt for 1000l. and 63s. damages. *Roll.* 50.

Certificate of
the master.

I do hereby certify, that judgment was signed in the above cause the 10th day of *Feb.* 1817.

Thomas Le Blanc.

Affidavit,
2s. 6d. stamp.

J. B. clerk to A. B. of, &c. gentleman, maketh oath and saith, that he was present and did see *Thomas Le Blanc* esq. secondary of the court of King's Bench, sign the certificate of the judgment in the memorial above mentioned. (a)

How to re-
gister.

Ingross this memorial and certificate on a piece of parchment, with a ten shilling stamp thereon, carry it to the master of the King's Bench Office, and he will, on seeing your *postea*, inquisition, or judgment paper, subscribe the certificate; swear the affidavit before a master in Chancery, or a judge of the court where the judgment was obtained, and when done, file it with the register in *Bell-yard*; pay the master 1s. oath 1s. and 5s. filing.

(a) The stamp for the affidavit is generally placed at the bottom of the memorial.

N. B. The clerk of the dockets may certify in the absence of the master or his deputy; this must be mentioned in the affidavit. *Vide* title *Executor* as to judgment docketed.

CONTINUANCES ON THE ROLL AND FINAL JUDGMENT AFTER TRIAL.

IF the cause be not tried the same term issue is delivered, the *venire* must be continued on the roll, by *vicecomes non misit breve*; as, supposing an issue be joined in *Easter* term, and the cause not tried till *Trinity*; then, after the award of the first *venire*, "*the same day is given to the parties aforesaid at the same place*," add this, at which day, before our said lord the king at *Westminster* came the parties aforesaid, by the attornies aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereupon, therefore let a jury thereupon come before our lord the king at *Westminster*, on *Friday* next, after the morrow of the Holy *Trinity*, by whom, &c. and who neither, &c. to recognize, &c. the same day is given to the parties aforesaid, at the same place. And if it be to *Michaelmas* term, award a new *venire* over to the first day, "*at which day*," &c. as above, in the same manner, from term to term; then if the cause is tried, enter on the roll thus:

Continuances
of the *venire*
on the roll.

Continuance
of the *venire*
by *vicecomes*
non misit
breve.

Afterwards the process being continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our lord the king at *Westminster* until next after (the return day of the *distringas*) unless (a) the king's right trusty and well-beloved *Edward Lord Ellenborough*, his majesty's chief justice, assigned to hold pleas before the king himself, shall first come on, &c. (the day mentioned in the *jurata*;) (at the *Guildhall* of the city of *London*;) according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; at which day, before our lord the king at *Westminster*, comes the said A. B. by his said attorney; and the said chief justice, (b) before whom the said issue

Continuance
of the process
and judgment
thereon.

(a) If at the assizes, follow the words of the *jurata*, unless the king's justices, assigned to hold, &c. If in *Middlesex*, at *Westminster-hall*, in the said county.

(b) The said justices of our said lord the king, have sent hither their record had, &c.

was tried, sent hither his record had in these words, to wit, Afterwards, that is to say (here enter the *postea* verbatim throughout from the record, then say,) it is considered that the said A. B. recover against the said C. D. his said damages, by the said jury in form aforesaid assessed; and also 41l. for his costs and charges, by the court of our said lord the king now here adjudged to the said A. B. by his assent, which damages in the whole amount to 100l. and the said C. in mercy, &c.

Judgment
signed the
day of
June, 1817.

Mercy,

For the entry of other judgments on the roll, *vide* title *Judgment*.

Entry of con-
tinuances.

The court will grant leave to enter continuances after verdict in ejectment, in order to arrive at the justice of the case, to prevent being barred by the statute of limitation. *Doe v. Dolman*, 7 Term Rep. 618.

EXECUTORS AND ADMINISTRATORS.

Of executors
and admini-
strators.

ADJUDGED, that when executors sue upon any contract of their testator, or for any wrong done to him, they shall pay no costs, either upon a nonsuit or verdict against them. 3 Salk. 105. *Bigland v. Robinson*. *Vide*, as to the nonsuit, 1 Salk. 207. 3 Burr. 1586.

If they plead
a false plea.

If an executor or administrator confess a judgment, and there are not assets sufficient, he is liable to pay the costs, *de bonis propriis*; therefore care ought to be taken before such judgment is confessed, that he receive no injury.

When to take
judgments of
assets in
future.

In an action against an executor or administrator, if the defendant plead *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment of assets *quando acciderint*; if in debt, a final judgment is signed, if in case, interlocutory, and afterwards a writ of inquiry is executed to complete it; for which judgments, see title *Judgment*.

False plea.

If an executor or administrator plead a false plea, and which, of his own knowledge, he knows such, as *ne unques executor*, or a release made to himself, and it is found against him, the judgment will be, "*de bonis testatoris, si, &c: si non de bonis propriis*;" for thereby he estrangeth himself from the testator, and the benefit of the

will, and, by his own falsity and folly hath made his own goods chargeable. *Roll. Abr.* 930. *Cro. Jac.* 671, 191. *Moor*, 96.

If an executor confesses the debt, or suffers judgment by default, he admits assets in his hands, and is estopped to say to the contrary on a *devastavit* returned, and so is a jury. *Lutw.* 670. If they suffer judgment by default.

An executor, defendant, shall pay costs in all cases, and the judgment is *de bonis testatoris ei, &c. et si non tunc de bonis propriis*; also when he is defendant, and there is judgment for him, he shall have his costs. *Cro. Eliz.* 503. *Plow. Com.* 183. *Hutt.* 69. When they pay costs as defendants.

If an executor brings error of judgment after a *devastavit*, he shall pay costs. *Str.* 977. But not upon the original action against him. Error, costs.

An executor is liable to pay costs on a *non pros*, for not declaring, but not upon a discontinuance. 3 *Burr.* 1584. *Hawes ex. v. Saunders.* Liable on non pros for not declaring.

So on a *non pros* for not joining in demurrer. *Higg, ad. v. Warry*, 6 *Term Rep.* 654. being her own fault in not making a *profert* of letters of administration. So for not joining in demurrer.

But not in all cases of discontinuance without paying costs. For if it is plainly his own fault, he shall not have such leave: so in the case of not going on to trial, if it is in his own laches, he shall pay costs. 1 *Salk.* 314. 4 *Burr.* 1929. *Bennet v. Coker.* Liable to costs for not going to trial.

Executors are liable to costs of a nonsuit, where they might have sued in their own right, although they sue as executors. *Grimstead v. Shirley*, 2 *Taunt.* 116. When liable to costs of nonsuit.

On an action brought by an administrator against an heir, plaintiff did not try according to his notice, the defendant moved for judgment, as in the case of a nonsuit, whereupon the plaintiff undertook to try peremptorily; when the cause came to trial, the plaintiff discovered that the estate had been conveyed, and was then satisfied that the deed would be produced against him, whereupon he declined going to trial, and now desired to discontinue without costs. The court granted the motion, but he was not to bring any new action, without leave of the court. 4 *Burr.* 1927. *Bennet adm. v. Coker.* After motion for judgment as in the case of a nonsuit, the administrator had leave to discontinue, though he undertook peremptorily to try.

Debt on a judgment against testator not docketed, is on a level with simple contract debts. And, on a plea of If a judgment be not docketed.

plene administravit to debt on a judgment against the intestate not docketed, the defendant may give in evidence, payment of a bond and other specialty debts, which exhausted all the assets. *Hickey v. Hayter ad. 6 Term Rep. 384. 4 & 5 W. & M. c. 20.* To make administratrix liable in this case as for a *devastavit*, the judgment should have been docketed; notice of it would not have done. *Ibid.*

Judgment of assets *quando*, &c. what it admits.

By taking of a judgment of assets *quando acciderint*, the plaintiff admits that the defendant hath fully administered to that time; but in an action of debt suggesting a *devastavit*, the court will not allow plaintiff to give evidence of effects come to defendant's hands before the judgment. *Bull. N. P. 169.*

Old method of obtaining judgment *de bonis propriis*.

The old way to obtain judgment against an executor or administrator, *de bonis propriis*, was to get the *fi. facias* returned by the sheriff, "*nulla bona*," then to issue a *scire fieri inquiry*; and upon the sheriff's return of a *devastavit*, a *scire facias* issued against the defendant, "*to shew cause why the plaintiff should not have execution de bonis propriis*," to which the defendant might appear and plead *plene administravit*.

Ld. Raym. 1382, Str. 623.

The best way.

But this is said not to be a good way to proceed where the debt is small, as no costs are allowed to the plaintiff, unless the defendant pleads to the *scire facias*: therefore the best way is, to bring an action suggesting a *devastavit*, and before brought, it is necessary that a *fi. fa.* be returned by the sheriff *nulla bona*, as to the goods of the testator.

As to payment of debts by executors.

In payment of debts, the executor must observe the rules of priority, otherwise, on a deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. First, he may pay all funeral charges, and the expence of proving the will and the like. Secondly, debts due to the king, on record or specialty. 1 *Andr.* 129. Thirdly, such debts as are, by particular statutes, to be preferred to all others: as the forfeitures for not burying in woollen; stat. 9 *Ann. c. 10.* Money due on poor's rates. 30 *Car. 2. c. 3.* Fourthly, debts of record, as judgments (docketed according to the 4 & 5 *W. and M. c. 20.*) statutes and recognizances, 4 *Term Rep.* 60. *Cro. Car.* 363. Fifthly, debts due on special contracts; as for rent, or upon bonds, covenants and the like, under seal. *Wentw. c. 12.* Lastly, debts on simple contract, viz. notes and verbal promises; among these sim-

ple contracts, *servants wages* are by some with reason preferred to any other. 1 *Roll. Abr.* 927.

Among debts of an equal nature, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to; 10 *Mod.* 496. and he may give it in evidence. 3 *Burr.* 1383. Wherever an executor or administrator may be sued, or might have paid, he may retain. *Ibid.* 1384. Covenant is as much a lien upon the assets, as an action of debt. *Ibid.*

When he may retain.

For judgment against executors, *vide title Judgments.* See my *Mod. Pleader*, for much useful information respecting executors.

FORMS OF POSTEAS.

AFTERWARDS (that is to say) on the day and at the place within contained, before the right honorable Edward Lord *Ellenborough*, the chief justice within mentioned, the honourable *Ewan Law*, esq. being associated unto the said chief justice, by force of the statute in that case made and provided, comes the within named A. B. by his attorney within mentioned, and the within named C. D. (although solemnly required) comes not but makes default; therefore let the jurors of the jury whereof mention is within made, be taken against him by his default: and the jurors of that jury being also summoned, also come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath, that the said C. D. did undertake and promise in manner and form as the said A. B. hath within complained against him: and they assess the damages of the said A. B. on occasion of the not performing the promises and undertakings within mentioned, over and above his costs and charges by him about his suit in this behalf expended, to 20l. and for those costs and charges to 40s. therefore, &c.

Postea for plaintiff on non assumption, where the defendant does not appear and defend.

Verdict.

You go no farther than *therefore, &c.* in the postea; when the master has taxed the costs, and signed the judgment, in case the roll is to be compleated, as in the case of error, or otherwise, and the roll is docketted and filed in the treasury; leave the postea with Mr. Edge, who is the clerk of the treasury, which is his authority for entering up the final judgment. But if the roll is not carried in, then you may compleat the final judgment thereon yourself; docket and file it.

To be ingrossed on a 10s. stamp.

The postea is ingrossed on the back of the record, stamped with a 10s. stamp, and taken to the clerk of the common bails, who marks thereon, "*delivered of record*;" pay him 6d. then go with it to the master's office, who will tax the costs, and sign the judgment, pay him in debt and case 4s. if in trespass 6s. 8d. more for the king's fine.

Postea for the plaintiff on non assumption where the defendant appears and defends.

Afterwards (that is to say) on the day and at the place within contained, before the right honourable Edward Lord *Ellenborough*, the chief justice within mentioned, the honorable *Ewan Law*, esq. being associated unto the said chief justice, according to the form of the statute in that case made and provided, come as well the within named A. B. as the within named C. D. by their respective attornies within mentioned; and the jurors of the jury whereof mention is within made, being summoned also come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath, that the said C. D. did undertake, and promise, in manner and form as the said A. B. hath within complained against him; and they assess the damages of the said A. B. on occasion of the not performing the promises and undertakings within mentioned, over and above his costs and charges by him about his suit in this behalf expended to 20l. and for those costs and charges to 40s. therefore, &c.

The like with a tales, where both parties appear by their attornies.

Afterwards (that is to say) on the day and at the place within contained, before the right honorable Edward Lord *Ellenborough*, the chief justice within mentioned, the honorable *Ewan Law*, esq. being associated unto the said chief justice, according to the form of the statute in such case made and provided, come as well the within named A. B. as the within named C. D. by their respective attornies within mentioned: and the jurors of the jury whereof mention is within made being summoned, some of them (that is to say) E. H. &c. (here name such of the jurors as appeared at the trial,) come, and are sworn upon that jury, and because the residue of the jurors of the same jury do not appear, therefore others of the bystanders, being chosen by the sheriff of the county aforesaid, at the request of the said A. B. (or C. D.) and by the command of the said chief justice, if in London or Middlesex; if at the assizes, "by command of the said justices") are appointed anew, whose names are annexed to the within written panel, according to the form of the statute in that case made and provided; which said jurors

so appointed anew, (that is to say) G. H. &c. (a) (naming the talesmen) being called, likewise come, who together with the said other jurors before impanelled, and sworn, being chosen, tried, and sworn, to speak the truth of the matters whitin contained, say upon their oath, that the said C. D. did undertake and promise, &c. (as in the last precedent to Therefore, &c.)

If the cause be tried at the assizes, the clerk of assize indorses the postea on the back of the record, and delivers it after four days in the next term to the successful attorney, who gives a receipt in the book for the same; unless either of the parties move for a new trial.

If tried at the assizes.

Afterwards, &c. (as before to the word sworn,) say upon their oath, that the within mentioned writing obligatory is the deed of the said C. D. as the said A. B. hath within in that behalf alledged; and they assess the damages of the said A. B. on occasion of the detaining of the within debt, over and above his costs and charges by him about his suit in this behalf expended, to one shilling, and for those costs and charges to 40s. Therefore, &c.

Postea for the plaintiff, on non est factum.

Afterwards, &c. (as before) say upon their oath, that the said C. D. doth owe to the said A. B. the within mentioned sum of 100l. in manner and form as the said A. B. hath within in that behalf alledged; and they assess the damages of the said A. B. on occasion of the detaining the within debt, over and above his costs and charges by him about his suit in this behalf expended to one shilling, and for those costs and charges to 40s. Therefore, &c.

The like on a plea of nil debet.

Afterwards, &c. (as before) say upon their oath, that the said C. D. is guilty of the several trespasses within laid to his charge, in manner and form as the said A. B. hath within complained against him; and they assess the damages of the said A. B. on occasion thereof, over and above his costs and charges by him about his suit in this behalf expended to 20l. and for those costs and charges to 40s. Therefore, &c.

The like on a plea of not guilty in trespass.

Afterwards, &c. (as before) say, upon their oath, that

The like on a plea of not guilty in case.

(a) The names of the jurors who appear, are marked by the associate, and he also puts on the back of the panel, the talesmen, which you insert in the postea as there stated.

the said C. D. is guilty of the premises within laid to his charge, in manner and form as the said A. B. hath within complained against him; and they assess the damages (as in the last precedent.)

The like where one defendant is found guilty, and another acquitted.

Afterwards, &c. (as before) say upon their oath, that the said C. D. is guilty of the several trespasses within laid to his charge, in manner and form as the said A. B. hath within complained against him; and they assess the damages of the said A. B. against the said C. D. on occasion thereof, over and above his costs and charges by him about his suit in this behalf expended to l. and for those costs and charges to 40s. And the jurors aforesaid upon their oath aforesaid further say, that the said E. F. is not guilty of the several trespasses within laid to his charge, in manner and form as the said A. B. hath within complained against him. Therefore, &c.

For an executor on a plea of plene administravit.

Afterwards, &c. (as before) say upon their oath, that the said C. D. on the day of exhibiting the within bill of the said A. B. (or if by original, of suing out the original writ of the said A. B. in this behalf,) had not any goods or chattels which were of the within named E. F. at the time of his death in the hands of him the said C. D. as executor of the last will and testament of the said E. F. to be administered, as the said C. D. hath within in pleading alledged: Therefore, &c.

The like for an executor on non assumpsit by the testator.

Afterwards, &c. (as before) say upon their oath, that the within-named E. F. in his life-time, did not undertake, or promise in manner and form as the said A. B. hath within in that behalf alledged: Therefore, &c.

Postea for plaintiff on a plea of non assumpsit infra sex annos.

Afterwards, &c. (as before) say upon their oath, that the said C. D. did within six years next before the day of exhibiting the bill (or if by original, of suing out the original writ) of the said A. B. against the said C. D. in this cause, undertake and promise in manner and form as the said A. B. hath within complained against him, and they assess the damages of the said A. B. &c. as before.

The like against an executor on a plea of non assumpsit by the testator.

Afterwards, &c. (as before) say upon their oath, that the within named E. F. in his life-time, did undertake and promise, in manner and form as the said A. B. hath within in that behalf alledged; and they assess the damages, &c. as before.

The like on a plea of plene administravit,

Afterwards, &c. say upon their oath, that the said C. D. on the day of exhibiting the within bill of the said A. B. (or by original of suing out the original writ of the said

A. B. in this behalf) had divers goods and chattels, which were of the within-named E. F. at the time of his death, in the hands of him the said C. D. as executor of the last will and testament of the said E. F. be administered, to the value of 1. as the said A. B. hath within in that behalf alleged; and they assess the damages, &c. as before.

Afterwards, &c. (as before) say, upon their oath, that the said C. is guilty of the trespass and ejectment within mentioned, in manner and form as the said B. had within complained against him; and they assess the damages of the said B. by occasion thereof, over and above his expences and costs, laid out by him in his suit in this behalf, to 1s. and for those costs and charges to 40s. Therefore, &c.

For plaintiff
in ejectment.

Afterwards, &c. say, upon their oath, that the within written C. D. in his lifetime did not pay to the said A. B. the within mentioned sum of 100l. or any part thereof on the day of in the condition of the within writing obligatory mentioned, according to the form and effect of the said condition, in manner and form as the said C. D. hath within in that behalf alleged, and they assess the damages of the said A. &c.

For plaintiff
on an issue of
solvit ad diem.

Afterwards, &c. (as before) say, that the said C. D. did undertake and promise, in manner and form as the said A. B. hath within complained against him; and they assess the damages of the said A. B. on occasion of the not performing the within mentioned promises and undertaking as well against the said C. D. as against the within-named E. F. over and above the costs and charges of the said A. B. by him about his suit in this behalf expended to 20l. and for those costs and charges to 40s.: Therefore, &c.

Postea for
plaintiffs on
non assump-
sit by one of
several defen-
dants, where
another lets
judgment go
by default.

Afterwards, &c. (as before) say upon their oath, as to the first issue joined between the said John and the said James, that the said James is guilty of the premises within charged upon him, as the said John hath within alleged; and as to the other issue joined between the said John and the said James, the said jurors upon their oath further say, that the said James of his own wrong, and without any such cause as the said John within in pleading hath alleged, made an assault upon the said John, and then and there did beat, bruise, wound, and ill-treat the said John in manner and form as the said John hath within in his said replication in that behalf alleged, and they assess the damages of the said John by reason thereof, besides his costs and charges by him laid out about his suit

For plaintiff
in assault on
not guilty,
and plea of
son assault
demeasne.

in this behalf to 5l. and for those costs and charges to 40s. :
Therefore, &c.

FORMS OF POSTEAS FOR DEFENDANT.

For defendant
on a verdict
of non as-
sumpsit.

AFTERWARDS, &c. (to the word sworn) say upon their oath, that the said C. D. did not undertake or promise, in manner and form as the said A. B. hath within complained against him: Therefore, &c. (in this case you follow the second precedent of the postea, where both attornies appear, to the word sworn.)

The like
where one
defendant had
let judgment
go by default,
and the other
pleaded.

Afterwards, &c. say upon their oath, that the said C. D. did not undertake or promise in manner and form as the said A. B. hath within complained against him; and hereupon the said jurors are discharged from inquiring against the within-named E. F. what damages the said A. B. hath sustained by reason of the premises within-mentioned. Therefore, &c.

The like on a
plea of set-off.

Afterwards, &c. say upon their oath, that the said A. B. was and is indebted to the said C. D. in manner and form as the said C. D. hath within in pleading alleged. Therefore, &c.

On a nonsuit
where evi-
dence given.

And the jurors of that jury being summoned, came, who, to say the truth of the within contents, were chosen, tried, and sworn; *and after evidence being given to them thereupon, they went from the bar of this court, to consider of their verdict to be given of and upon the premises; and after the said jury had considered thereof and agreed among themselves, they returned to the said bar to give their verdict in this behalf, upon which the said A. B. (the plaintiff) being solemnly called comes not; nor did he further prosecute his said bill (or writ) against the said C. D. Therefore, &c.*

If no evidence
given.

In case no evidence be given, the plaintiff does not appear by his counsel; the words in italics are to be left out.

EXECUTION.

The writ of
execution,
what.

AN execution is a judicial writ, grounded on the judgment of the court from whence it issues, and is supposed to be granted by the court, at the request of the party at whose suit it is, to give him satisfaction on the judgment which he hath obtained: and therefore an exe-

ution cannot be sued out in one court, upon a judgment obtained in another.

There are but three sorts of executions commonly in use at this time for the obtaining satisfaction for a debt, damages, or costs given by the judgment, viz. a *capias* *ad satisfaciendum* (a) against the body of the defendant only; and whenever the body is taken by this writ, the plaintiff can have no other execution against his goods and chattels, lands or tenements; for as *corpus humanum non recipit aestimationem*, so it is deemed the greatest and highest satisfaction one man can have of another. And hence if a man died in custody before the 24 Jac. 1. c. 24, on this writ, the debt was presumed to be satisfied; but by this statute he may have other execution against his lands or goods at his election. A *fi. fa.* against the goods and chattels of the defendant only. And an *Elegit.* against the goods and chattels (except oxen and beasts of the plough), and also one half of the defendant's lands, to hold by the plaintiff until the debt, or damages and costs, are satisfied.

Leave refused to take out execution; notwithstanding a writ of error, where defendant did not appear, but that the declaration of the defendant that he would sue out a writ of error and delay plaintiff, was made before any action pending. *Baskett against Barnard and another, 4 Maule and Selw. 291.*

The court refused to set aside an execution issued pending a writ of error, where after judgment against defendants, their attorney proposed to give a cognovit for the debt and costs payable at a future time, and offered to sign it, observing it would save expence to the parties, as he should otherwise be under the necessity of bringing a writ of error to obtain the time he had requested in the cognovit, for that he must obtain time. *Spooner and others v. Garland and others, 2 Maule and Selw. 474.*

After final judgment is signed, the plaintiff may, if no writ of error be served, immediately, and before it is entered on the roll, either bring an action of debt on the judgment, (b) or he may, within a year after the judgment

Three sorts
of execution.
Ca. sa.

Fi. fa.
Elegit.

Leave to sue
out execution
refused, though
brought for
delay.

Court will not
set aside exe-
cution pending
a writ of error.

After judg-
ment signed,
may bring an
action or have
execution.

(a) For the sheriff's duty, on a *ca. sa.* vide my Office of Sheriff, 3 Ed. 97.

(b) But now see the statute 43 Geo. 3, c. 56, s. 4. as to the costs.

signed, (*to be computed from the time of signing the judgment,*) take out execution against the body, lands or goods of defendant; but where he brings debt on the judgment, he cannot, pending that suit, take out execution, unless he discontinues that action.

Separate *ca. sa.* on a joint action bad.

A separate *ca. sa.* against one defendant, on a joint judgment against two, cannot be supported. 6 *Term Rep.* 525. *Clarke v. Clement.*

If a consent to discharge one of several defendants.

If the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.* he cannot afterwards retake him, or take any of the others. *Ibid.*

If a consent be obtained to discharge out of execution on an undertaking to pay, cannot sue

If the plaintiff consents to the defendant's being discharged out of execution, on his undertaking to pay at a future day, he cannot afterwards sue out any execution on that judgment, in the event of the defendant's not fulfilling his undertaking. *Tanner v. Hague*, 7 *Term Rep.* 420.

out *ca. sa.* again on that judgment.

The defendant was charged in execution in 1783, and plaintiff died in 1797. The wife of defendant took administration, and motion to discharge him out of custody on that account. Lord *Kenyon* said, the administration being legal, there was an end to the action, the defendant's wife being the legal representative of plaintiff, and plaintiff's attorney had no lien, so as to prevent defendant being discharged. Rule ab. *Pyne v. Erle*, 8 *Term Rep.* 407.

If plaintiff die after the defendant has charged him in execution.

If one of two defendants taken on a joint *ca. sa.* be discharged under an insolvent debtor's act, that will not operate as a discharge of the other, the discharge of the former not being with the actual consent of the plaintiff. *Bottie v. Wardle*, 5 *East Rep.* 147.

If one of two defendants be discharged by insolvent act, will not operate as a discharge of the other.

There ought not to be two executions existing at the same time, but you may have a *fi. fa.* first, and if the sheriff does not levy to the amount of the debt, for damages recovered, you may have a *ca. sa.* for the residue; in such case the sheriff should return the *fi. fa.* and the levy thereon first, which ought to be recited in the *ca. sa.* *Salk.* 118. *Cro. Eliz.* 344; but if he does nothing on the *fi. fa.* then there is no necessity to recite the sheriff's return in the *ca. sa.* or of its having been issued.

Cannot be two executions at one time.

An *elegit* may be had after *fi. fa.*

An *elegit* may be had after a *fi. fa.*; but if once the body is taken, there cannot be a *fi. fa.* or *elegit*; for the body is deemed the highest satisfaction.

Within what time to be sued out.

These executions must be sued out within a year and a day after the judgment is signed, and the time is to be

accounted from the day of signing judgment, otherwise there must be a *scire facias*, unless delayed by bills in Chancery. 1 *Burr.* 660. Or if occasioned by error. 1 *Str.* 301.

But if it be taken out and returned by the sheriff within the year, there needs no *scire facias* before you sue out another; and it is proper to award the first on the roll, with the sheriff's return thereon. *Str.* 100. *Aires v. Hardress, N. on R. E.* 5 *Geo.* 2. When no need of a *sci. fa.*

Actions were brought upon a promissory note against the drawer and indorser, and judgments in both. Defendant having tendered the principal in one, and the costs in both, court ordered that no execution should be taken out. *Str.* 515. *Idem v. Trull.* Cannot have two executions where only one satisfaction is due.

If you first sue out a *feri facias* against the defendant's goods, and levy part thereof, you may afterwards have a *fi. fa.* or an *elegit* for the residue of the debt and damages, or a *ca. sa.* After *fi. fa.* may have *ca. sa.*

The court refused to stay execution after verdict and judgment, which was affirmed on error, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action; and the rule *nisi* having been obtained upon the defendant's own affidavit alone, they discharged it with costs. *Warwick v. Bruce, 4 Maule and Selw.* 140. Court refused to stay execution till after the trial of indictment for perjury.

The *ca. sa.* may be sued out after an *elegit* executed only on goods, and a *nihil* returned as to the lands; for there being a *nihil* returned as to the lands, the *elegit* was but in the nature of a common *feri facias*. The election is not complete, unless the plaintiff has some benefit from the land. *Bacon v. Peck, Str.* 226. May be sued where no benefit from *elegit*.

The common writ of *ca. sa.* may be had at the law stationer's in case, or debt, printed in blank on parchment, 6s. stamp, which when filled up, is to be sealed, pay 7d. Common *ca. sa.* may be had at the stationers.

A *ca. sa.* in debt for a penalty, as on a bond, you may direct the sheriff to take the poundage, and also for the writ. How to levy in debt on *ca. sa.*

In case, trespass, &c. it is otherwise, unless the debt is confessed with a penalty on a *cognovit*: if so, then you may indorse the writ to be levied with sheriff's poundage, the same as in debt. In case,

Ca. sa. in Debt. (a)

George the third, by the grace of God, of the united kingdom of *Great Britain and Ireland*, king, defender of the faith. To the sheriff of *Middlesex*, greeting: we command you, that you take C. D. if he be found in your bailiwick; and him safely keep, so that you have his body before us at *Westminster* on

next after to satisfy A. B. as well a certain debt of l. which the said A. B. lately in our court before us at *Westminster* recovered against him; as also 80s. which in our said court before us were adjudged to the said A. for his damages which he had sustained as well by occasion of the detaining that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record; and have you there then this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the 17th day of Feb. in the 57th year of our reign. (b)

Take 658l. 3s. besides sheriff's poundage, and all other incidental expences.

The like in Assumpsit.

George the third, by the grace of God, of the united kingdom of *Great Britain and Ireland*, king, defender of the faith. To the sheriffs of *London*, greeting: we command you, that you take C. D. if he be found in your bailiwick; and him safely keep, so that you have his body before us at *Westminster* on

next after to satisfy A. B. l. which were adjudged to the said A. B. in our said court before us at *Westminster* for his damages which he had sustained, as well by reason of the non-performance of certain promises and undertakings made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted; as appears to us of record; and have you there then this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the 17th day of Feb. in the 57th year of our reign.

Take the whole.

(a) To be sued out in the county where the venue is laid.

(b) All writs of execution should be tested in term time. 2 *Salk.* 700. And as the judgment relates to the first day of the term wherein it is signed if it is sued in the term, it may be tested on the first day (in full term,) or any day in the term: if proceedings be by bill, it is made returnable on a certain day; if by original on a

In Covenant. (a)

For his damages, which he had sustained, as well by reason of a certain breach of covenant made between the said A. B. and C. D. as for his costs and charges by him expended in and about his suit in that behalf, whereof the said C. D. is convicted, as appears to us of record.

Trespass and Assault.

For his damages, which he had sustained as well by occasion of a certain trespass and assault, then lately committed by the said C. D. on the said A. B. as for his costs, &c.

Trespass.

For his damages, which he had sustained, as well by occasion of a certain trespass then lately committed by the said C. D. as for his costs.

In Ejectment for Damages.

For his damages, which he had sustained as well by occasion of a certain trespass and ejectment of farm, done to the said A. B. by the said C. D. at L. in your county, as for his costs and charges by him expended in and about his suit in that behalf, whereof, &c.

Replevin.

For his damages, which he had sustained as well by occasion of the taking and unjustly detaining the cattle of the said John, at W. in a certain place called the H. in your county, &c. as for his costs, &c.

For Words.

For his damages, which he had sustained as well by occasion of the speaking and publishing certain false and scandalous words by the said C. D. of the said A. B. as for his costs and charges, &c.

general return day, *wheresoever*, &c. The teste as well as the return may be amended. *Say*. 12. If issued out of term, it is tested the last day of the preceding term.

(a) The statutes relating to poundage, are 29 *El. c. 4 Salk.* 332. 3 *Geo. 1, c. 15, s. 17*. If the sheriff take the defendant on a *ca. sa.* though he be taken to prison, and remain there, the plaintiff is entitled to his poundage, and can maintain an action of debt for it. See 4 *Burr.* 1981. 2 *Ld. Raym.* 1212. So if a detainer comes, *Tidd.* 6 *Ed.* 1095. cites *Taylor v. Ward, E. 24 Geo. 3.* but it must be on the real debt *bond fide* due, and marked on the back of the writ. 3 *Geo. 1. c. 16*. The writ of *elegit*, though mentioned in the preamble of the statute of 3 *Geo. 1. c. 15.* is omitted in the body of the enacting clause: and hence it seems that the sheriff is entitled on entering an *elegit* to poundage on the whole amount of the debt. 1 *Maule and Selw.* 105.

Execution
may go into
Wales.

On a judgment in this court, execution may be awarded into *Wales*, or a county palatine. *Cro. Jac.* 484. *Cro. El.* 445. 1 *Lev.* 291. *Ray.* 206. 1 *Lev.* 256.

For the Defendant.

To satisfy C. D. l. which were adjudged to the said C. D. in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his costs and charges by him laid out about his defence, in a certain plea of trespass on the case, prosecuted in our said court before us, by the said A. B. against the said C. D. whereof the said A. B. is convicted, as appears to us of record, and have you there then this writ. Witness, &c.

In a penal Action.

To satisfy us and A. B. who sues as well for us as himself in this behalf, l. debt which the said A. B. who sues as aforesaid, in our court before us, recovered against the said C. D. (that is to say,) one moiety thereof, to wit, l. to the said A. B. who sues as aforesaid, to his own proper use, and the other moiety thereof, to wit, l. to our own proper use, according to the form of the statute in such case made and provided, whereof the said C. D. is convicted, as appears to us of record, and have there then, &c.

On a Nonsuit.

To satisfy C. D. l. which were adjudged to the said C. D. in our court before us at *Westminster*, according to the form of the statute in such case made and provided, for his costs and charges which he sustained by reason of the false claim of the said A. B. in a certain plea of trespass on the case, prosecuted in our said court before us, by the said A. B. against the said C. D. whereof the said A. B. is convicted, as appears to us of record, and have, &c.

For an Administrator.(a)

To satisfy A. B. administrator of all and singular the goods and chattels, rights and credits, which were of E. F. deceased, who died intestate, as well a certain debt of l. as also l. for his damages which he had sustained, as well by occasion of the detaining the said debt, as for his costs and charges laid out by him about his suit in that behalf, whereof the said C. D. is convicted, as appears to us of record, and have there then, &c.

The costs
taxed.

(a) To satisfy J. D. executor of the last will and testament of J. W. deceased, as well, &c.

Execution omitting a term in its teste, is not void, the Teste. cause being at an end. *Salk.* 700. *Ld. Ray.* 775.

All writs of execution may be amended by the award Amendment. on the roll, which, previous to application, get properly awarded thereon.

A writ of *ca. sa.* was amended after defendant taken, A ca. sa. amended. by altering the sum in the writ, and striking out part to which he was not liable. *2 Term Rep.* 737. *Larouche v. Wasbrough.*

The sheriff may take all the defendants in execution. May take all defendants. *5 Rep.* 86. *11 Rep. Godfrey's Case.*

If the execution be taken out after judgment on a If after sci. fa. *sci. fa.* by default, then, after the words, "whereof he is convicted, as appears to us of record," say, "and whereof in our same court, before us, it is considered, that the said *John* have his execution against the said *Richard* for the debt and damages aforesaid, by the default of the said *Richard*, as likewise appears to us of record; and have you there then this writ. Witness, &c."

If the defendant is not to be found in the county where Testatum. *venue* is laid, then sue out a *testatum*, which is generally done in the first instance, (but the *ca. sa.* must issue to warrant the *testatum*; they may be sealed together, pay *1s.* 2d.) *3 Term Rep.* 388. the form of which is as follows:

George, &c. (to the end of the first writ.) As appears Testatum ca. sa. to us of record, and our said sheriff of *Middlesex*, at a certain day now past returned to us, that the said *Richard* was not found in his bailiwick; whereas it is testified in our said court before us, that the said *Richard* lurks and wanders up and down in your county; and have there then this writ. Witness, &c. (pay sealing both writs, *1s.* 2d.)

N. B. By original say, "and have you there this writ;" leave out the word *then*.

A *capias ad satisfaciendum* lies not against peers of the realm, or their wives, or peers of *Scotland* or *Ireland* Will not lie against peers. (except upon a statute merchant, pursuant to stat. of *Acton Burnell*, *11 Ed.* 1. or statute staple, according to *37 Ed.* 3, or on a recognizance in nature of a statute staple,

upon 23 H. 1. c. 6. Nor against members of parliament, executors or administrators, for the debt of the testator or intestate.(a)

When the court will not set aside a test. ca. sa.

Rule why defendant should not be discharged, and why the *testatum ca. sa.* should not be set aside, there being no original *ca. sa.* to warrant it. The court said, the plaintiff may cure the objection even after error brought, but were inclined to think, that as the original *ca. sa.* was not returned by the sheriff, or entered on the roll, that was a fatal objection.—It was then suggested, that the roll was not in court, but that if another day were given to plaintiff to bring in the roll, the original would appear properly there; accordingly the matter stood over till this day, when the writ appearing properly entered on the roll, the rule was discharged. *Milstead v. Coppard*, 5 Term Rep. 272.

Rule why *testatum ca. sa.* should not be set aside, because no original *ca. sa.* to warrant it, and because the *testatum* was not warranted by the judgment, which was for *trespass, assault, and for crim. con.* with plaintiff's wife, whereas the execution was for *trespass and assault on plaintiff*. Pending rule, plaintiff applied for another rule to amend the *testatum ca. sa.* by making it conformable to the judgment, and to sue out and seal an original *ca. sa.* in London, to warrant the *testatum*; both motions came on together. Court on seeing the record produced in court, said, that the foundation of the application failed, for that it then appeared to them that the proceedings were regular, the record (meaning the roll) being produced in court with the *ca. sa.* entered, and sheriff's return. They discharged the first rule, and thought it reasonable the second rule should be made absolute without costs. *Shaw v. Maxwell*, 6 Term Rep. 451. Vide 3 Term Rep. 657. *Cowperthwaite v. Owen*, S. P.

When the defendant cannot be taken in execution.

A defendant superseded for want of being charged in

(a) If defendant escape or be rescued, the plaintiff may sue out a new execution if he pleases, but then he has no remedy against the sheriff. 2 Bac. Abr. 240, 244, 355. And if he escape from the King's Bench prison, the plaintiff on application to a judge may have an escape warrant. And see stat. 1 Ann. c. 6.

execution within two terms *after* judgment, cannot be again arrested and taken in execution upon the same judgment; but it would have been otherwise had defendant been superseded for want of proceeding in time before judgment. 7 *East*, 330. *Lyne v. Lowe*.

Fieri facias. (a)

This writ was the only writ of execution that lay at common law, and was afterwards confirmed by the statute of *West. 2*. It lies as well against privileged persons, peers, members, &c. as other common persons; and against executors or administrators with regard to the goods of the deceased, as for costs awarded against them by false pleading or confession of judgments, if no goods of the testator are to be levied for those costs. (b)

The nature of this writ.

By stat. 43 *Geo. 3. c. 46. sect. 5*. it is enacted that in every action, in which the plaintiff shall be entitled to levy under an execution against the goods of any defendant, such plaintiff may also levy the poundage, fees, and other expences of the execution, over and above the sum recovered by the judgment.

What plaintiff may levy.

If part only of the debt be levied on this writ, the plaintiff may have a *ca. sa.* for the residue, but he should recite the sheriff's return. 1 *Roll. Abr.* 904. *Cro. Eliz.* 344.

If part be levied.

There need not be fifteen days between the teste and return of any *ca. sa.* or *fi. fa.* (except against bail, or in outlawry). Stat. 13 *Car. 2. c. 2. s. 7, 8*.

Teste.

If it be sued out in term time, teste the writ the first day of the term (although the judgment is not signed till four days after); in vacation, teste it the last day of the term.

If sued out in term, or vacation.

Rule why *teste fi. fa.* should not be set aside, and the goods restored, plaintiff not having issued a *fi. fa.* to warrant it; the court said, according to the established

A *fi. fa.* must be sued out to ground a testatum.

(a) This writ in point of form invariably pursues the judgment, and therefore it has been holden, that a *special* execution is not warranted by a *general* judgment. 1 *T. R.* 80. *Sed vide* 3 *B. & P.* 187.

(b) *Vide my Office of Sheriff*, 3d *Ed.* p. 101. as to the sheriff's duty on this writ.

practice, the want of an original *fi. fa.* was a decisive objection, though the irregularity might be cured by a subsequent production of that writ. Rule absolute. *Brand v. Mears*, 3 Term Rep. 388.

N. B. The court will not look at the date of the seal, if it is produced; therefore, before this motion comes on, if sued out, it will do, so as it be produced under seal at the time of shewing cause.

As to amending *fi. fa.*

The court will not allow the plaintiff to amend a *fi. fa.* where the defendant has become bankrupt before sale of the goods under it. *Hunt v. Pasman*, 4 Maule and Selw. 329.

From what time the goods and lands are bound.

By stat. 29 Car. 2. the goods are bound only from the time of the delivery of the writ to the sheriff; see 1 T. R. 731. but lands are bound from the day of the judgment.

If all the money is not levied.

If all the money is not levied, the writ must be returned before a second execution can be made out, because the second is grounded on the deficiency of the first, *Salk.* 318.; and the sheriff's return to the first writ must be recited. *Ibid.*

Fraudulent *fi. fa.*

A *fieri facias* being executed fraudulently, a *fi. fa.* at the suit of another, afterwards, shall stand good, and is to be preferred. 1 Wils. 44.

Bankrupt:

The defendant had been declared a bankrupt, the certificate had been signed by four parts in five in number and value of the creditors, but not allowed at the time a writ of *fieri facias* issued. Motion to set it aside. The debt was previous to the bankruptcy: court discharged the rule. *Callen v. Meyrick*, 1 Term Rep. 362.

If goods are seized the day on which defendant becomes bankrupt.

Where goods are seized under a *fi. fa.* the same day that the plaintiff commits an act of bankruptcy, it is open to inquire at what time of the day the goods were seized, and the act of bankruptcy was committed, and the validity of the execution depends upon the priority. 4 Campb. 197.

If delivered two months before commission issued.

By 49 Geo. 3. c. 121. Executions levied more than two months before commission of bankrupt issued, will bind the goods, notwithstanding a prior act of bankruptcy.

If two writs are delivered, the first to have the priority.

Where two writs of *fi. fa.* against the same defendant, are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure

was first made under the subsequent execution; and if the person claiming under the *second* execution pay the sheriff the amount of the debt under the *first* execution for his security, the court will not compel the sheriff to refund that money on motion. And *Ashurst*, Justice, said, that the principle of law is, that the person whose writ is *first* delivered to the sheriff is entitled to a priority, and that the goods of the party are bound by the delivery of the writ. *Hutchinson v. Johnson*, 1 *Term Rep.* 129, 131.

The court will not order the sheriff to retain, in satisfaction of a present writ of *fi. fa.* issued by plaintiff against the defendant, money or bank notes, which the sheriff had before received, for the use of the defendant, in discharge of an execution levied by the defendant, against another, and which the sheriff had not paid over. *Knight v. Cuddle*, 9 *East*, 48.

The sheriff that begun the execution shall end it, though he is out of office, *Salk.* 323: and may sell goods after he is out of his office, without a *venditioni exponas*. *Lord Raym.* 990. Sheriff who began the execution shall end it.

If the sheriff return, that he has levied the goods, and that they remain in his hands for want of buyers, and he continues in office, a *venditioni exponas* issues to make sale thereof, by which he is compelled thereto. If he be out of office before he makes sale, then sue out a *distingas* to compel him to sell the goods, directed to the new sheriff, to distrain the old sheriff to sell, whereby he is compellable so to do; or move for issues against him to the value of the goods. 6 *Mod.* 295, 296. If sheriff return the want of buyers, how to proceed.

On a *fi. fa.* upon a judgment against one partner, the sheriff may take the goods of both, and the vendee shall have a moiety in common with the other. *Comb.* 217. *Dougl.* 627. *Wightwick's Rep.* 50. If against one partner.

If a man died in execution formerly, his executors were no farther chargeable; but now, by stat. 21 *Jac.* 1, c. 24, "though he do die in execution, yet the plaintiff may have an execution against his lands, goods and chattels." If defendant dies in execution.

This writ does not abate by the plaintiff's death; but the sheriff must go on to execute his writ. *Mod. Ca. L. & Eq.* 225. *Salk.* 322. 6 *Mod.* 290. Does not abate by plaintiff's death.

A landlord is entitled to a year's rent in the case of an execution, without deduction, and the sheriff must take care of him, 8 *Ann. c.* 14, s. 1; but a ground landlord Landlord.

cannot come in for a year's rent on an execution against an under-lessee; for the statute only extends to the immediate landlord. *Str.* 787. The landlord must give the sheriff notice, or the sheriff is not bound. 1 *Str.* 97. *Vide* 2 *Wils.* 140. And is entitled without paying any poundage. *Str.* 643.

If a term of years be sold, the termor cannot maintain ejectment against the vendee to recover the same.

If a sheriff sell a term of years under a writ of *fi. fa.* which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. *Doe*, on the demise of *Emmett v. Thorn*, 1 *Maule and Selw.* 425. But it seems otherwise, if the term be extended upon *elegit*, or forfeited on outlawry, and sold, and the judgment, or outlawry be reversed. *Cro. Jac.* 246. *Cro. Eliz.* 278.

If after verdict, and before day in bank.

If a plaintiff dies after a verdict, and before the day in bank, though the judgment be right, yet a *sci. fa.* must be awarded before execution. 1 *Wils.* 302. *Earl v. Brown*.

When may be sued without *scire facias*.

If a *fi. fa.*, *ca. sa.*, or *elegit*, be taken out within the year, and returned and awarded on the roll, the same may be continued from term to term, to the time of the execution thereof, although after the year, and be as effectual as if the judgment had been revived by *scire facias*. N. on R. E. 5 *Geo.* 2. But a *fi. fa.* must be left with the proper officer, before he will make the entry on the roll, returned by the sheriff.

When the king to be preferred, and when not.

If the king's extent be sued out posterior to a judgment recovered by the subject, and a writ of execution thereon be delivered by the sheriff, though not executed, the king shall not be preferred. *Uppom v. Sumner*, 2 *Black. Rep.* 1251, 1294. *Vide* *Com. Dig.* 2. v. 538. 3 *Mod.* 236, *Lechmere v. Thornygood*; held, that after execution at the suit of the subject begun, but not completed, the king's extent came too late. *Vide* 33 *H.* 8, c. 39, s. 74. *Hard.* 23. *Comyn*, 123. 7 *Rep.* 18.

When execution at the suit of the crown to have the priority.

Process sued out by the crown against a defendant to recover penalties, on which judgment for the crown is afterwards obtained, entitles the king's execution to have priority within the stat. 33 *H.* 8. c. 39. s. 74. before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against same defendant prior to the king's judgment, but subsequent to the commencement of the king's process; the king's execution having been delivered to sheriff before

the actual sale of the goods, under plaintiff's execution.
Buller v. Buller, 1 East, 338.

If goods be taken on a *fi. fa.* against the king's debtor, and before sale, an extent comes at the suit of the king, grounded on a bond debt, tested after the delivery of the *fi. fa.* to the sheriff, the goods cannot be taken on the extent. *Rorke v. Dayrell*, 4 Term Rep. 402. If an extent at the suit of the crown be tested prior to the time, when the subject's execution is delivered to the sheriff, the former shall have the preference: but as by the common law, abridged as it is by the statute of frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor, on which the prerogative of the crown can attach. In this case the sheriff had actually seized the goods under the plaintiff's execution, and an execution once begun shall proceed; it shall not stop on the issuing of a commission against the debtor; and in this respect I know no distinction between the case of the crown, and that of the subject.
Lord Kenyon.

Although a judgment be obtained by the subject first, and he lays by, and does not execute his writ, Mr. J. *Buller* said, he was inclined to think the execution by the subject would be postponed.

The words of the stat. 33 H. 8. are, *that the king's suit shall be preferred to that of any other person, so always that the king's suit be taken or commenced, or process awarded, before judgment given for the said other person or persons.*

If the execution (it is said) be tested in the defendant's life-time, it may be taken out and executed after his death. 12 Mod. 5. 2 Ld. Ray. 850. 7 Mod. 95. *Gilb. Exc.* 15, 16. *Gilb. Law of Executions*, 46. *Cro. Eliz.* 181. 1 Mod. 188. *Comb.* 33. *Pract. Reg.* 215. 7 Term Rep. 20.

An execution may relate back to the first day of the term, though the defendant died before execution actually taken out. But if the execution be tested after the defendant's death, it is irregular. *Ibid*, 24. See *Heapy v. Paris*, 6 Term Rep. 368.

Kensington Palace, being kept in constant state of preparation to receive the king, with his officers, servants, and guards, residing and doing duty there at all times, and some of the royal family having apart-

If goods taken on *fi. fa.* and before sale, extent comes in.

If subject obtained a judgment first.

The stat. 33 H. 8.

If tested in defendant's life-time.

Relation back of execution.

A *fi. fa.* cannot be executed in Kensington palace.

ments there, is privileged as a royal palace, against the intrusion of the sheriff, for the purpose of executing process against the goods of a person having the use of certain apartments therein. *Winter v. Miles, knight, and another, late sheriff of Middlesex*, 10 East, 578.

If tested out of term.

An execution tested out of term is not void. 2 Burr. 1188. ; it may be amended.

How to be ingrossed and sealed.

The writ of *fi. fa.* is to be ingrossed on a 5s. stamp parchment, and only to be sealed; pay 7d. and is to issue only in the county where the *venue* is laid.

The law stationers have them ready printed in case, or debt.

When to issue a *testatum fi. fa.*

But if the goods are to be taken in another county, then you issue out a *testatum fieri facias*.

The forms of the *fieri facias*, and the *testatum*, will be as follow:

To be issued in the county where *venue* is laid, otherwise a *testatum*.

Fi. fa. in Assumpsit.
George the third, &c.
To the sheriff of Gloucestershire, greeting: we command you, that you cause to be made of the goods and chattels in your bailiwick of C. D. which A. B. lately in our court, before us at *Westminster*, recovered against him, for his damages, which he had sustained as well by means of the not performing certain promises and undertakings made by the said C. D. to the said A. B. as for his costs and charges by him expended about his suit in that behalf, whereof the said C. is convicted, as appears to us of record; and have you that money before us at *Westminster*, on next after

to render to the said A. B. for his dama-

Fi. fa. in Debt.
George the third, &c.
To the sheriff of *Middlesex*, greeting: we command you, that you cause to be made of the goods and chattels in your bailiwick of C. D. as well a certain debt of l. which A. B. lately in our court, before us at *Westminster*, recovered against him, as also l. which in our same court before us were awarded to the said A. B. for his damages which he had sustained, as well by the occasion of the detaining the said debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said C. is convicted, as appears to us of record; and have you that money before us at *Westminster*, on next after

to render to the

ges aforesaid; and have said A. for his debt and damages aforesaid; and have there then this writ. Witness, &c.

Law and Markham.

Law and Markham.

If after a scire facias, and by default, after the words, "whereof the said C. is convicted, as appears to us of record," say, "and whereupon it is considered in our same court, before us, that the said A. have his execution against the said B. of the debt and damages aforesaid, according to the force, form and effect of the said recovery, by the default of the said B. as also appears to us of record; and have you that money before, &c."

If in assault, say, "for his damages which he sustained, as well by reason of a certain trespass and assault, lately committed by the said C. on the said A. at Westminster in your county, as for his costs, &c."

If in covenant, "for his damages which he sustained, as well by reason of a certain breach of covenant made between the said C. and the said A. as for his costs, &c."

For his damages, which he sustained as well by reason of a certain trespass, and ejectment committed against the said A. by the said C. at E. in your county, as for his costs, &c.

Money, being the surplus of a former execution against defendant's goods, was refused to be staid in the late sheriff's hands, for the purpose of satisfying another execution at the suit of the same plaintiff against same defendant, who had no other effects on which the sheriff could levy. *Fieldhouse v. Croft, 4 East, 510.*

If the sheriff be served with a rule to return *fi. fa.* which expired the last day of the term, and he does not file his return at the rising of the court, the court will grant an attachment. *Rex v. Sheriff of Surrey, 11 East, 591.*

Testatum fi. fa. in Assump.

George, &c. To the sheriffs of *London*, greeting: We command you, that you cause to be made, &c. (to the end of the *fi. fa.*) da-

Testatum fi. fa. in debt.

George, &c. To the sheriff of *Middlesex*, greeting, &c. (to the end of the *fi. fa.*) damages aforesaid: and our sheriffs of *London*, at a

Sheriff cannot apply money left in his hands being the surplus of a former execution to the payment of another execution. When the writ must be filed if rule out last day of term.

Testatum
part.

mages aforesaid: and our sheriff of *Middlesex* hath returned to us at *Westminster*, that the said C. had not any goods or chattels in his bailiwick whereof he could cause to be made the damages aforesaid, or any part thereof: whereas it is testified in our same court, before us, that the said C. has sufficient goods and chattels in your bailiwick, whereof you may cause to be made the damages aforesaid, and every part thereof; and have there then this writ. Witness, &c.

certain day now past, returned to us, that the said C. had not any goods or chattels in their bailiwick, whereof they could cause to be made the debt and damages aforesaid, or any part thereof: whereas it is testified in our same court before us, that the said C. hath sufficient goods and chattels in your bailiwick, whereof you may cause to be made the debt and damages aforesaid, and every part thereof; and have there then this writ. Witness, &c.

If the proceedings are by original.

N. B. If the proceedings be by original, add the defendant's addition as in the declaration; at the foot of the execution say, *and have there this writ*, and make it returnable on a general return day, as on the morrow of All Souls, wheresoever we shall then be in *England*.

Testatum for the residue.

If there is a levy on the *fi. fa.*, and it be necessary to have a *testatum* for the residue, you must recite the first *fi. fa.* and sheriff's return thereon, and then command the sheriff to levy the residue. *Salk. 319. Oviat v. Vyner.*

A Non omittas fi. fa.

George, &c. To the sheriff of *Norfolk*, greeting: We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and cause to be made of the goods and chattels in your bailiwick of C. D. (the same as a *fi. fa.*)

Testatum fi. fa. into Durham, in Case.

George, &c. To the Right

Fi. fa. for the Residue in Assumpsit.

George the third by the grace of God, &c. To the sheriff of — greeting: Whereas we lately commanded you, that of the goods and chattels of C. D. in your bailiwick, you should cause to be made —l. which A. B. then lately in our court before us at *Westminster*, had recovered against C. D. for his damages which he had sustained, as well on occa-

Reverend Father in God,
— by divine permission
lord bishop of *Durham*, or
to his chancellor there,
greeting: We command
you, that by our writ, un-
der the seal of your bishop-
rick duly to be made, and
to the sheriff of the county
of *Durham* to be directed,
you command the said she-
riff, that of the goods and
chattels of C. D. in his bai-
liwick, he cause to be made

which A. B. lately in
our court before us at *West-
minster*, recovered against
him, for his damages,
which he had sustained, as
well by means of the not
performing certain promi-
ses and undertakings, lately
made by the said C. to the
said A. B. as for his costs
and charges by him laid out
about his suit in that behalf,
whereof the said C. is con-
victed, as appears to us of
record; and have you the
said money before us at
Westminster, on next
after to render to
the said A. B. for his da-
mages aforesaid: and our
sheriff of *Middlesex*, at a
certain day now past, re-
turned to us, that the said
C. had not any goods or
chattels in his bailiwick,
whereof he could cause to
be made the damages afore-
said, or any part thereof:
whereas it is sufficiently
testified in our same court
before us, that the said C.
hath sufficient goods and
chattels in our said county

sion of. the not performing
certain promises and under-
takings then lately made
by the said C. D. to the said
A. B. as for his costs and
charges by him about his
suit in that behalf expend-
ed; whereof the said C. D.
was convicted, as appeared
to us of record; and that
you should have that money
before us at *Westminster*
on next after to
render to the said A. B. for
his damages aforesaid. And
you at that day returned
to us, that by virtue of the
said writ to you directed,
you had caused to be made
of the goods and chattels
of the said C. D. —I.
parcel of the damages afore-
said, which money you had
ready at the day and place
in the said writ contained,
as by the said writ you
were commanded: and that
the said C. D. had not any
other, or more goods or
chattels in your bailiwick
whereof you could cause to
be made the residue of the
damages aforesaid, or any
part thereof. Therefore we
command you that of the
goods and chattels of the
said C. D. in your bai-
liwick, you cause to be made
—I. residue of the dama-
ges aforesaid; and have you
that money before us at
Westminster, on next
after to render to
the said A. for the residue
of his said damages; and
have then there this writ.
Witness, &c.

palatine, whereof the said sheriff can cause to be made the damages aforesaid, and every part thereof; and have you there then this writ. Witness, &c.

Fi. fa. de bonis ecclesiasticis, in Debt.

George, &c. To the Right Reverend Father in God, —, by divine Providence lord bishop of *Lincoln*,

greeting; we command you, that of the ecclesiastical goods of C. D. late of, &c. clerk, in your diocese, you cause to be made a certain debt of 1000*l.* which A. B. lately in our court before us at *Westminster*, recovered against him; as also 80*s.* which were adjudged to the said A. B. in our same court before us, for his damages, which he had sustained, as well by occasion of the detaining that debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said C. is convicted, as appears to us of record, and have you the said monies before us at *Westminster*, on next after, to render to the said A. B. for the debt and damages aforesaid; and whereupon our sheriff of *Middlesex*, on next after in this same term (or in term last past) returned to us at *Westminster*, that the said C. D. had not any goods or chattels, nor any lay fee in his bailiwick, whereof he could cause to be made the debt and damages aforesaid, or any part thereof; and that the said C. D. was a beneficed clerk, to wit, rector of the rectory (a) and parish church of W. in the county of B. in your diocese of *Lincoln*; and have you there then this writ. Witness, &c.

This writ is to be sealed, pay 7*d.* and sent to the register of the diocese, who will make out a sequestration, the plaintiff first giving security by bond to the bishop.

Of the *fi. fa. de bonis ecclesiasticis*.

When the sheriff returns, that the defendant is a beneficed clerk, not having any lay fee, a writ goes to the bishop of the diocese, in the nature of a *re-levari* or *feri facias*, to levy the debt, and damages, *de bonis ecclesiasticis*, which are not to be touched by lay hands, and thereupon the bishop sends out a sequestration of the profits of the clerk's benefice, directed to the churchwardens, to collect the same, and pay them to the plaintiff, till the full sum be raised. 2 *Burn's Eccl. Law*, 329.

(a) Or vicar of the vicarage.

The bishop may be ruled to return the writ, and will be liable to an action if he make a false return. *Gillb. Exec.* 26. 1 *Ld. Ray.* 265. The bishop may be ruled to return writ.

George, &c. To the Right Reverend Father in God — by divine permission archbishop of *Canterbury*, primate of all *England*, and metropolitan, greeting: We command you, that of the ecclesiastical goods of C. D. clerk of the diocese of — which is within the province of *Canterbury* as ordinary of that church, the episcopal see of — now being vacant, you cause to be made, &c. (as in the last precedent.) Fi. fa. de bonis, &c. to the archbishop of Canterbury during the vacancy of a bishop's see.

Fi. fa. in Assumpsit against an Administratrix, where she confesses the Debt of the Testator, or on a Recovery.

The like against an Administratrix in Debt.

George, &c. We command you that you cause to be made of the goods and chattels in your bailiwick, which were of C. D. at the time of his death, in the hands of E. G. administratrix of all and singular the goods and chattels, rights and credits, which were of the said C. deceased, at the time of his death, who died intestate, to be administered

1. which A. B. lately in our court, before us at *Westminster*, recovered against the said E. administratrix as aforesaid, for his damages, costs, and charges, which he had sustained by reason of the non-performance of certain promises and undertakings made by the said C. D. in his lifetime, to the said A. whereof the said E. is convicted, as appears to us of record, if she hath so much thereof

George, &c. We command you, that of the goods and chattels in your bailiwick which were of C. D. at the time of his death, in the hands of E. G. widow, administratrix of all and singular the goods and chattels, rights and credits, which were of the said C. at the time of his death, who died intestate, to be administered, you cause to be made as well a certain debt of 1. which A. B.

lately in our court before us at *Westminster*, recovered against the said E. administratrix as aforesaid; as also 1. which in our said court before us were adjudged to the said A. for his damages, costs and charges, which he had sustained, by means of detaining the said debt whereof the said E. is convicted, as appears to us of record, if she hath so much thereof in her hands to be administer-

in her hands to be administered; and if she hath not so much in her hands to be administered, then that you cause to be made 6l. 10s. being the costs and charges of the said A. and parcel of the damages aforesaid, of the proper goods and chattels in your bailiwick, of the said E. administratrix as aforesaid; and have you that money before us at *Westminster*, on next after to render to the said A. for his damages aforesaid; and have there then this writ. Witness, &c.

ed, and if she hath not so much thereof in her hands to be administered; then that you cause to be made the said l. the damages and costs aforesaid, of the proper goods and chattels in your bailiwick, of the said E. administratrix as aforesaid: and have you that money before us at *Westminster*, on next after to render to the said A. for his debt and damages aforesaid; and have you there then this writ. Witness, &c.

N. B. *If it be against an executor, add the words, "Executor of the last will and testament of A. B. deceased."*

Fi. fa. for defendant's costs on verdict.

George, &c. We command you that you cause to be made of the goods and chattels of A. B. in your bailiwick, 14l. 10s. which were awarded to D. E. in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his costs and charges by him expended in and about his defence, in a certain plea of trespass on the case (as the action is,) prosecuted in our said court before us by the said A. against the said D. whereof the said A. is convicted, as appears to us of record; and have you that money before us at *Westminster*, on next after and have you there then this writ. Witness, &c.

When the sheriff may summon a jury.

The sheriff summoned a jury to satisfy himself whether a claimant of the goods seized under a *fi. fa.* had a right or not. On motion to set aside the inquisition, and to have the goods sold for plaintiff's benefit: Lord *Kenny*, This application is perfectly new in practice, and I am not sure it is founded in principle. This is a kind of inquest of office; it is merely to indemnify the sheriff in making his return to the writ, but it does not bind the right between the litigating parties: I do not know that we have any authority to interfere: if we were to set aside the inquisition, I do not think we could order a new inquiry. Rule refused. *Roberts v. Thomas*, 6 Term Rep. 58

Vide *Dalt. Sher.* 146. *Gilb. on Execu.* 21. As soon as it becomes necessary to justice to inquire to whom the goods belong, the sheriff is bound to make that inquiry. Lord *Kenyon*, 4 *Term Rep.* 648. *Farr v. Newman*, Vide *Dougl.* 40. Such an inquisition is not evidence. Vide *H. Black. Rep.* 2 V.

For Costs on a Nonsuit.

George the third, &c. To the sheriff of *Middlesex*, greeting: we command you, that you cause to be made of the goods and chattels in your bailiwick of A. B. 1. which were awarded to C. D. in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his expences and costs, (a) which he has been put to by reason of the false claim of the said A. in a certain plea of trespass on the case, prosecuted in our said court before us, by the said A. against the said C. whereof the said A. is convicted, as appears to us of record; and have you that money before us at *Westminster*, on, &c. Witness, &c.

Venditioni exponas.

George, &c. To the sheriff of *Middlesex*, greeting: whereas we lately commanded you, that you should cause to be made of the goods and chattels of C. D. 1. which A. B. lately in our court before us at *Westminster*, recovered against him for a debt; and also s. which, &c. (here recite the writ *verbatim*;) and that you should have that money before us at *Westminster*, on, &c. to render to the said A. for his debt and damages aforesaid; whereof the said C. D. is convicted, as appears to us of record; and you at that day returned to us at *Westminster*, that you had made of the goods and chattels of the said C. to the value of the debt and damages aforesaid; which said goods and chattels remained in your hands unsold for

(a) If on a *non pross* for not declaring, say, by him laid out in and about his defence in a certain action brought by the said A. against the said C. in our said court before us, for that the said A. hath not declared against the said C. by his bill or declaration, in any personal action, or ejectment, against the said C. D. before the end of term last, being the next term after the appearance of the said C. D. at the suit of the said A. B. whereof the said A. B. is convicted, &c.

want of buyers: therefore we being desirous that the said A. be satisfied his said debt and damages, command that you sell, or cause to be sold, the said goods and chattels of the said C. by you in form aforesaid taken, and every part thereof, for the best price that can be got for the same, and at least for the debt and damages aforesaid: so that you have that money arising from such sale, before us at *Westminster*, on, &c. to render to A. B. for his debt and damages aforesaid; and have there then this writ. Witness, &c.

Præcipe.

Middlesex. Vend. exponas for A. B. against C. D. for ——— l. debt and ——— s. damages, returnable on ——— next after ———.

This writ is to be signed by Messrs. *Provost and Chamber*; pay 1s. 8d. Seal 7d. a *præcipe* is to be made for the office.

If goods taken are not of full value.

If the goods taken are not to the full value, the plaintiff may have a *venditioni exponas* for part and *fi. fa.* for the residue, in the same writ. *Tidd*, 923. *Thes. Brev.* 305. 2 *Saund.* 47. l. (2).

Where old sheriff returns taken the goods,

Where the old sheriff returns, that he has taken goods, which remain in his hands for want of buyers, the usual way of proceeding is by writ of *distringas* directed to the new sheriff, commanding him to distrain the old one, to sell the goods, and have the money in court himself. 6 *Mod.* 299.

If *fi. fa.* be irregular.

If the writ of *fi. fa.* be issued irregular, the defendant may move the court to set it aside, and that the goods or money levied may be restored to him. A third person, whose goods are taken under it, may also move the court to have them restored. But the facts must be clear, or court will leave the party to his action against the sheriff, or direct an issue, and retain the money in court to abide the event of the trial.

If sheriff delay sale.
1 B. and P.
359.

If the sheriff delays or refuses to sell, the legal and proper mode of compelling a sale is by writ of *venditioni exponas*, on which he must return the money into court. *Cowp.* 406. *Cameron v. Reynolds*. The sheriff is bound for the amount of his appraisement. *Ld. Ray.* 1075.

Fieri facias
for non pros.
for not replying.

For his costs and charges by him laid out in and about his defence in a certain action of trespass on the case upon promises (or as the action is) then lately commenced and depending in our said court before us, at the suit of the said A. B. against the said C. D. for that the said A. B. hath not replied to certain pleas then lately pleaded by

the said C. D. in the said action, or further prosecuted the same; whereof the said A. B. is convicted, as appears, &c.

For that the said A. B. had not surrejoined to certain rejoinders then lately made by the said C. D. in the said action, or further prosecuted the same; whereof, &c. The like for not surrejoining.

For that the said A. B. had not entered a certain issue (or certain issues) then lately joined between the said A. B. and the said C. D. in the said action, or further prosecuted the same; whereof, &c. For not entering the issue.

As to more concerning this writ, see *Office of Sheriff*, 3 *Ed.* 101.

Elegit. (a)

This is a judicial writ, given by the statute of *West. 2.* *Elegit.* 13 *Ed.* 1. stat. 1. c. 18. either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. If the goods are not sufficient, then the moiety, or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff, to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's term be expired, or till the death of the defendant, if he be tenant for life or in tail. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken. A term of years may either be extended or sold, as part of the personality. 8 *Co.* 171. A rent-charge may be extended. *Moor*, 32. So may lands in ancient demesne. *Hob.* 47. But a rent-seck, or copyhold lands, cannot. *Cro. Eliz.* 650. 3 *Co.* 9.

The stat. says, *the sheriff shall deliver to the plaintiff all the chattels of the debtor, (save only his oxen, and beasts of his plough,) and the one half of his land, until the debt be levied, upon a reasonable price or extent.*

If the lands are extended upon an *elegit*, the plaintiff is for ever barred from having another execution; but if he If no lands are extended, a ca. sa. may issue.

(a) There is a writ of *levari facias*, which enables the sheriff to seize the goods, receive rents and profits of his lands till satisfaction is made. Little use is now made of this writ, the remedy by *elegit* being much more effectual.

levies on the goods only, upon the *elegit*, and the sheriff return *nihil* as to the land, a *ca. sa.* may issue for the residue against the defendant; for the election cannot be complete, unless the plaintiff has some benefit from the land, for the taking out the writ is not an actual election, but only in order to an election; and if there be no lands, there is nothing to choose, and consequently no election; where there are no lands an *elegit* is no more in effect than a *feri facias*. *Hob.* 58. *Str.* 226. *Bacon v. Peck*. And a *fi. fa.* may issue for the residue, if no lands be extended.

Sheriff's duty.

Upon an *elegit* the sheriff is to impanel a jury (but no notice thereof is given on the other side,) who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same; and also to inquire as to his lands and tenements, and upon such inquisition, the sheriff is to deliver all the goods and chattels (except the oxen and beasts of the plough,) and a moiety of the lands, to the party, and must return his writ, in order to record such inquisition. *2 Inst.* 396.

Ejectment.

The sheriff does not put the plaintiff in possession; therefore, in order to recover, he must bring an ejectment.

Appraisement.

And if the sheriff finds goods, he may deliver them to the plaintiff by appraisement. *Ld. Ray.* 346.

It lies against peers, &c.

This writ lies against peers and members, also against executors and administrators upon a *devastavit* returned. *Carth.* 283.

Elegit in Debt.

To be signed by Messrs. Provost and Chambre, pay 1s. 8d. seal 7d. to be ingrossed on a 6s. stamp parchment; a præcipe is to be made for the office.

George the third, &c. To the sheriff of Kent, greeting: whereas A. B. lately in our court, before us at *Westminster*, (a) by bill, without our writ, and by the consideration and judgment of the same court recovered against C. D. as well a certain debt of l. as also 80s. which in our said court before us were adjudged to

Elegit in Case.

George the third, &c. To the sheriff of Kent, greeting: whereas A. B. lately in our court, before us at *Westminster*, by bill, without our writ, and by the consideration and judgment of the same court, recovered against C. D. l. which in our said court before us were adjudged to the said A. as well for his damages,

(a) If by original say "by our writ, and by the consideration, &c."

the said A. for his damages, which he had sustained by means of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us by record, and afterwards

which he had sustained by means of the non-performance of certain promises and undertakings made by the said C. to the said A. as for his costs and charges by him laid out about his suit in that behalf, whereof the said C. is convicted, as appears to us of record, and afterwards

the said A. B. came into our court before us, according to the form of the statute in such case made and provided, and chose to have delivered to him all the goods and chattels of the said C. D. (except the oxen and beasts of his plough,) and likewise a moiety of all the lands and tenements of the said C. D. in your bailiwick, to hold to him the said goods and chattels, as his proper goods and chattels, and to hold a moiety of the lands and tenements aforesaid to him and his assigns, as his freehold, according to the form of the statute in such case made and provided, until he shall thereof have fully levied the said debt and damages; therefore we command you, that without delay, you cause to be delivered to the said A. by reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick (except the oxen and beasts of his plough,) and also a moiety of all the lands and tenements in your bailiwick, whereof the said C. D. or any person or persons in trust for him, on the day of (the day the judgment was signed) in the 57th year of our reign, on which day the judgment aforesaid was given, or ever afterwards, was seized, to hold to him the said A. the said goods and chattels, as his own proper goods and chattels, and also to hold the said moiety of the said lands and tenements to him and his assigns as his freehold, according to the form of the said statute, until he shall thereof have fully levied the said debt and damages: and in what manner you shall have executed this our writ, make appear to us at *Westminster*, on next after under your seal, and the seals of those by whose oath you shall make the said extent and appraisement; and have there then this writ. Witness, &c.

Kent. *Elegit* for A. B. against C. D. for l. debt and *Præcipe*.
80s. damages, returnable on next after

If on an *elegit* it is found that the plaintiff was seized of the lands, at the time the judgment was given; upon What proof is necessary to support an

ejectment on an ejectment (which must be brought to recover the possession,) the plaintiff need only give in evidence the office copy of the judgment, *elegit*, return, and inquisition thereupon filed, and is not bound to prove the party seized at the time of the judgment; if he was not seized, it must be proved by the other side. *Gill. L. of E.* 10. *Vide. Salk.* 563. *Ld. Ray.* 718.

JUDGMENT BY DEFAULT.

Judgment by default is an implied confession of the action.

THE judgment by default, which is an implied confession of the action, is either by *nil dicit*, where the defendant appears, but says nothing in bar or preclusion of the action; or by *non sum informatus*, where his attorney says, he is not informed of any answer to be given thereto.

By *nil dicit*.

Judgment by *nil dicit* is either for want of a plea, or for want of a plea adapted to the nature of the action, or circumstances of the case, or for not pleading in due time, or in a proper manner.

If the defendant returns the paper-book with the plea, and replication struck through, the judgment in that case is by default, it being in such case as if he had not pleaded.

Either interlocutory or final.

Judgment by default is either *interlocutory* or *final*; and where the action sounds in damages, as in *assumpsit*, *covenant*, *trover*, *trespass*, &c. the judgment is interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained: and the judgment for the plaintiff, in these actions, is also interlocutory on demurrer, or *nul tiel* record.

In actions on promissory notes and bills, &c.

In actions on promissory notes, and bills of exchange, after interlocutory judgment is signed for want of a plea, instead of executing a writ of inquiry, it is now the practice to apply to the court in term, or to a judge in vacation for a rule or summons to shew cause why it should not be referred to the master, to see what is due for principal and interest.

If plaintiff dies after judgment.

Where interlocutory judgment was signed, and the plaintiff died on a subsequent day in term, the court granted a rule to compute principal and interest on the bill on which the account was brought. *Berger v. Green*, 1 *Maule and Selw.* 229.

May obtain rule same day judgment is signed.

The plaintiff may obtain a rule for referring a bill of exchange to the master, the day on which interlocutory

judgment for want of a plea is signed. *Pocock v. Carpenter*, 3 *Maule and Selw.* 109.

The court referred it to the master, to see what was due for principal and interest, upon a bill of exchange, upon the production of a copy of the bill, verified by affidavit of the plaintiff's attorney, the original being stolen out of his pocket, and no tidings of it gained. *Brown and others v. Massiter*, 3 *Maule and Selw.* 281.

On the expiration of the time for pleading, a rule having been given, and plea demanded when necessary, the plaintiff's attorney must search for a plea, if not delivered him, with the clerk of the papers, and with the clerk of the judgments, who keeps the general issue book, at the King's Bench Office; and if no plea be delivered, filed, or entered at either of those offices, the plaintiff's attorney may then sign his judgment as for want of a plea.

After interlocutory judgment is signed in actions of assumpsit, trover, trespass, &c. a writ of inquiry is generally awarded; directed to the sheriff of the county, where the venue is laid, to ascertain the damages by a jury.

But in actions of debt, as on a mutuatus, on a warrant of attorney, bond for payment of money, bail-bond, or debt for goods sold, money lent, laid out, &c. the judgment is *final* in the first instance, and execution may issue on taxation of the costs.

In case the defendant does not plead within the time allowed by the rules of the court, or confess the action, the plaintiff may sign judgment against him by default, a rule to plead having been given, and demand made where necessary. (a)

But if plaintiff delay signing his judgment after the

(a) If declaration be delivered or filed to plead within the first four days of the next term, the defendant has all the morning of the fifth day to plead, and judgment cannot be signed until the opening the office in the afternoon of that day. But in any other part of the term, if the defendant do not plead within the four days, the plaintiff may sign judgment in the morning of the fifth day. *Shepherd v. Mackreth*, E. 35 Geo. 3. K. B. *Tidd*. 480, 6 Ed.

time, and defendant pleads, it must be accepted; 1 *Term Rep.* 17. *Minnis v. Baxter*; and judgment cannot be signed.

If an action be against two, one pleads and the other suffers judgment by default.

In all joint actions upon contract, debt, covenant, &c. against two or more defendants, where one pleads, and the other lets judgment go by default; if he who pleads obtains a verdict, the plaintiff shall not reap any benefit from his judgment by default; but it is otherwise in actions of trespass or tort. *Ld. Ray.* 1373. *Ligg v. Benger*.

For what judgment may be signed.

If a plea be delivered or filed before defendant has entered his appearance, (although he takes declaration out of the office,) plaintiff may file bail according, &c. and sign judgment: for he is not in a capacity to plead, until he is in court. So if a special plea be delivered instead of being filed; or if defendant do not rejoin, plead to a new assignment, or join in demurrer, or return the paper book in due time. Or if an order is not drawn up and served for time to plead. 7 *East*, 542. *Sedgwick v. Allerton*. Or where he pleads a plea not adapted to the nature of the action, as *nil debet* instead of *non assumptit*. *Capitain v. Day*, T. 15 *Geo.* 3. Or if after craving *oyer* of a deed, he do not set forth the whole. 4 *Term Rep.* 370. Or if he pleads a plea in abatement after the four days. 1 *Term Rep.* 277. 689. Or enters *solvit ad diem* in the general issue book. *Lockhart v. Mackreth*, Trin. 34 *Geo.* 3. Or pleads a judgment recovered, or other plea, when under terms to plead issuably. 1 *Burr.* 59. Or does not take the declaration out of the office before plea pleaded. 1 *Wils.* 173. Or files a sham demurrer, after an order to plead issuably. 3 *Burr.* 1788. Or pleads a plea of tender, without paying the money into court. 1 *Str.* 638. Or pleads in bar, before bail perfected. 4 *Term Rep.* 579. Or where he files a sham demurrer to the replication, when under terms to rejoin gratis; or pleads a special plea without leave of the court, after rule to abide by the plea. 1 *Term Rep.* 693. So if he is under an order to plead issuably, and one of the pleas be not so. 3 *Term Rep.* 105. *Waterfall v. Glode*. So if he do not return the special demurrer book in due time; pleads a plea in abatement without an affidavit of the truth being annexed; or does not perfect his bail after such plea filed, if he pleads before bail are perfected; or if he does not plead such a plea within the term allowed; or where the defendant, under an order to plead specially, puts in

a sham demurrer to some of the counts, and pleads issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea. *Cuming v. Sharland*, 1 *East*, 411.

The writ was returnable 15th Nov. the 2d. return of the term, declaration filed, and notice given *de bene esse* the 24th Nov. with notice to plead in eight days. Plaintiff, 3d Jan. being six weeks after, filed common bail for the defendant, and rule to plead having been duly entered, signed judgment on that day. It appeared there were two *Sundays* included, the 16th & 23d. Court held the judgment to be regular. *Shadwell v. Angel*, 1 *Burr.* 55.

If two Sundays intervene.

If *feme sole* marries after interlocutory judgment, plaintiff may proceed and take her in execution without a *sci. fa.* to make her husband a party. *Cooper v. Hunchey*, 4 *East*, 521.

If *feme sole* marries after interlocutory judgment.

Where the plea is an improper one, the safest way is not to sign judgment, but demur, or move the court to set the plea aside.

If plea improper.

Although defendant be under an order to plead issuably, and put in a plea, though informal, which goes to the substance of the action: or if the defendant pleads not guilty to an action of debt on a penal statute, 5 *Term Rep.* 152. the plaintiff cannot sign judgment as for want of a plea. 1 *Term Rep.* 462. or attempts to justify words. Nor can he sign it for non-payment of the issue paper, or demurrer book. R. H. 35 *Geo.* 3. Nor for the non-payment of the warrant of attorney, when the copy of the declaration is delivered to him. 4 *Term Rep.* 370. But the plaintiff may sign judgment without the demand of a plea; after an order for time obtained, if such plea be not delivered or filed in time.

For what plaintiff cannot sign judgment.

First enter on a roll (which you get of Mr. Adams, Lincoln's Inn, or any of the law stationers) warrants of attorney for the plaintiff and defendant, make also a memorandum thereon of the term in which the declaration was delivered or filed, then take a 4d. stamp paper, and enter only the memorandum thereon, which take to the clerk of the judgments in the King's Bench office, he will sign the same, pay 4d. per sheet, and 8d. for the warrants of attorney. If the action be in debt, enter the judgment on a 10s. stamp paper, make the entry on the roll as before, tax the costs with the master, and take out execution.

How to sign interlocutory judgment.

When judgment may be signed. It appears to be the practice to sign judgment on the 2d of *November*, before the *essoign-day*, in all cases where common bail is filed between the 2d and the 6th of *November*. 5 *T. R.* 65. *Wansey v. Moore*.

If there be an order for two days to plead, judgment cannot be signed until the third day in the afternoon.

When a regular judgment may be set aside. Although the judgment be regular, yet where the plaintiff has not lost a trial, the court will on motion set it aside upon an affidavit of merits; the defendant undertaking to pay the costs. 1 *Salk.* 402. 2 *Salk.* 518. to plead issuably *instant*, and to give judgment of the term when necessary, so as to put the plaintiff in the same situation as if the judgment had not been set aside. 2 *Str.* 823. 975. 1 *Burr.* 568. And the court will do this in ejectment, as well as in other actions. 2 *Str.* 975. 4 *Burr.* 1996. But as the rule is conditional on payment of costs, the costs must be forthwith paid, or plaintiff may still proceed.

When not. But the court will not set aside a regular judgment to give the defendant advantage of nicety of pleading. 2 *Str.* 1242.

When an irregular judgment may be set aside. If plaintiff sign an interlocutory judgment irregularly, the court will set it aside upon an affidavit of the facts, in which affidavit "*shew the writ having issued, the delivery of the declaration, and the time when the rule to plead expired; or if upon terms of accommodation, shew the special matter, and the advantage taken;*" and as it is a rule to shew cause, no notice of motion is necessary. (a)

When not. But an irregular judgment will not be set aside, after the defendant has given a *cognovit*. *Davis v. Hughes*, 7 *T. R.* 206.

When to take the advantage of an irregular judgment. The proper time for taking an advantage of an irregularity, is before the adverse party takes another step in the cause. *Per Cur.* 1798. And an affidavit on which the contents are stated to the court, must be filed, even though the motion should be refused. *Rock v. Marnell*, *Hil.* 39 *Geo.* 3.

Plaintiff may waive the judgment.

(a) But the plaintiff may waive the judgment previous if he find he is irregular, by getting the clerk of the judgments to strike it out; but to prevent a motion he should give notice thereof to defendant's attorney.

INQUIRY.

GENERALLY it is laid down, where damages are to be recovered, a jury must be called to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is, "*that the plaintiff ought to recover his damages, but because the court know not what damages the plaintiff hath sustained, therefore the sheriff is commanded, by the oaths of twelve honest and lawful men, to inquire into the said damages, and return such inquisition into court.*" (a) This process is called a writ of inquiry, which is a judicial writ directed to the sheriff of the county where the action is laid; in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained, who must assess some damages; the sheriff (on the fourth day after the return of the writ) delivers to the plaintiff's attorney his return, with the inquisition annexed; previous to which, viz. on the return day of the inquiry, there should be a rule for judgment given with the clerk of the rules, as hereafter.

In like manner when a demurrer is determined for Demurrer. the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete without the aid of a writ of inquiry, (except actions on bills of exchange and promissory notes, &c.)

In debt, the judgment is commonly said to be final, but when an action is brought on a judgment, the plaintiff may have a writ of inquiry, after judgment by default, to recover interest by way of damages for the detention of the debt. 7 Term Rep. 446. *Blackman v. Fleming*. When plaintiff may have a writ of inquiry in debt.

Where there is no necessity for this Writ.

A writ of inquiry of damages, is a mere inquest of office, to inform the conscience of the court: who, if they please, may themselves assess the damages, or direct them

3 Wils. 61.
Bruce v.
Rawlins,
2 Wils. 372.
1 H. Bl. 262.

(a) If the award of the writ of inquiry on the roll be right, and the teste of the writ wrong, it shall be amended by it. *Johnson v. Toulmin*, 4 East, 173.

to be assessed by the master. It does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. *Thelluson v. Fletcher*, Doug. 314. In actions upon a bill of exchange, or a promissory note, nothing but the instrument is to be proved before the jury, the sum being thereby ascertained. Though even in cases where there is no necessity for a writ of inquiry, that proceeding is of use, when the plaintiff goes for interest, which the jury assesses in the name of damages. *Buller, J. ibid*, 316.

In actions on notes, bills, &c.

It is now the practice in both courts, in actions on promissory notes, and bills of exchange, in actions on covenant for payment of a sum certain, *Doug.* 316. or on an award, or in other actions where the quantum of damages depends on figures, and may be as well ascertained by the master as before a jury, in covenant for mortgage money, 8 *Term Rep.* 326. *Berthen v. Street*, for nonpayment of rent. *Byron v. Johnson*, 8 *Term Rep.* 410. Also where judgment is obtained in debt upon a judgment 1 *Sid.* 442. 3 *Leon.* 213. See 1 *Saund.* 106. *Holdipp v. Otway*, if the plaintiff will assent to it instead of executing a writ of inquiry, to apply to the court in term time, or to a judge in vacation for a rule, or summons, to shew cause, "why it should not be referred, to see what is due for principal and interest, and why final judgment should not be signed for that sum," without executing a writ of inquiry; upon which the court, or judge, will make an absolute rule, or order, unless good cause be shewn to the contrary. 4 *Term Rep.* 275. *Shepherd v. Charter.*

How the rule is obtained.

The rule is obtained on an affidavit "that the declaration in the cause is on a promissory note, or bill of exchange, bearing date, &c. whereby the defendant promised to pay, &c." (Here state the fact contained in the declaration shortly; and that interlocutory judgment is signed for want of a plea. Counsel's fee is 10s. 6d. for the rule to shew cause, 1l. 1s.; to make the rule absolute.)

When to be moved for.

It seems, in 3 *Smith's Rep.* 179. that this application cannot be made on the *same day* the judgment is signed; it being usual to sign the judgment *one day*, and move the court at a *subsequent day*.

The court have decided that notice of taxing on a rule to compute though very proper and convenient in practice, is not absolutely necessary, the defendant has notice of

the proceeding by the service of the rule *nisi* to be present if he pleases. *Sellers v. Dufton*, *Hil. Term* 1813.

In what actions court will not grant the rule.

But where the defendant had suffered judgment by default in an action of assumpsit on a foreign judgment, 4 *Term Rep.* 493. *Messin v. Ld. Massarene and ux.*; and in action on a bill of exchange for foreign money, 5 *Term Rep.* 87. *Maunsell v. Ld. Massarene*, and in assumpsit for a sum certain, due upon an agreement, *Tidd*, 504. or in an action on a bottomry bond, *ibid.* *Palin v. Nicholson*, *E. 38 Geo.* 3. or to ascertain the damages sustained by the plaintiff, in an action of debt on a judgment recovered on a bill of exchange, 8 *Term Rep.* 395. *Nelson v. Sheridan*, the court will not grant such a rule. But where there is a demurrer to one count, on a bill of exchange, and judgment for the plaintiff, and a plea to other counts, on which issue was joined, the court referred it to the master, to see what was due to the plaintiff on the former. 7 *Term Rep.* 473. *Duperoy v. Johnson*. In such case, however, a *nolle prosequi* must be first entered on first other counts. 2 *Smith's Rep.* 46, in (n.)

But where there is a demurrer to one count on a bill of exch. and plea to other count.

Where the demand is not certain upon the record, a writ of inquiry must issue, as in trespass, *Yel.* 152. So in trespass on the case, replevin, assault, &c. 3 *Lev.* 213. *Lut.* 211, 213.

When a writ of inquiry must issue,

If one defendant pleads to issue, and the other makes default, a writ of inquiry is awarded on the roll, to prevent a discontinuance, but does not issue; for the jury which tries the issue, must assess the damages. 1 *Lev.* 141. 11 *Co.* 6. a. *Heydon's case*.

When it need not issue.

In debt upon a replevin-bond, assigning for breach the not making a return of the goods distrained for rent, the plaintiff may after signing judgment against the defendant for not returning the demurrer-book, tax costs and issue execution for the costs, and the amount of the goods distrained as indorsed on the replevin-bond without executing a writ of inquiry. *Middleton v. Bryan*, 3 *Maule and Selw.* 155.

In replevin.

The want of a writ of inquiry is aided by the statute of jeofails. *Str.* 878. *Malleroy v. Jennings*. See 1077. where it was lost, and a new one supplied.

Where damages are omitted to be given to an overseer defendant, on a verdict for him, a writ of inquiry shall issue. *Str.* 1021. . And a suggestion shall be entered on the roll for that purpose, *Rep. Temp. Hard.* 138. *Sayer*, 214. which must be moved for.

When defendant may have this writ. 43 *EL c.* 2.

Of Notice of Inquiry.

To whom the notice is to be given if defendant has appeared.

When the judgment is signed, you may give notice of inquiry, which is to be given in writing, and if the defendant have appeared, and his attorney be known, it should be delivered to such attorney in writing. *Say. Rep.* 133. Or if an agent be employed in country causes it is now determined that the notice is to be delivered to the agent in town, by whom the subpoenas are issued; and the court declared that should be understood to be the rule in future. *Hayes v. Perkins*, 3 East, 568. E. 43 Geo. 3.

To whom, if defendant has not appeared.

But if the defendant have not appeared, or his attorney be not known, the notice must be delivered to the defendant himself, or at his last place of abode. *Say. Rep.* 133.

How many days notice is to be given.

If the venue be laid in *London* or *Middlesex*, and the defendant live within forty computed miles from *London*, there must be eight days notice of executing the inquiry given, *exclusive* of the day it is given, which notice is also sufficient in country causes. *Sty. Pract. Reg.* 421. *title Notice*. See N. on R. *Mich.* 4 Ann. (c) For the stat. 14 Geo. 2. c. 17. s. 4. which requires ten days notice of trial at the assizes, does not extend to notice of inquiry. But where the venue is laid in *London* or *Middlesex*, and the defendant lives above *forty* computed miles from *London*, there must be *fourteen* days notice of inquiry *exclusive* of the day it is given. N. on R. M. 4 Ann. (c) 8 Mod. 21.

Sunday when is to be accounted a day.

And Sunday is to be accounted a day in these notices, unless it be the day on which the notice is given, *ib.* but such notice cannot be served on a Sunday.

When a term's notice is necessary.

Where no proceedings have been had within four terms, then a term's notice must be given; for where a term's notice of trial is required, there must at the same distance of time be the like notice of executing a writ of inquiry. *Peyton v. Bardus*, 2 Stra. 1100. (a)

When not necessary.

But if the proceedings have been staid by injunction

(a) And it may be given at once, without any previous notice of a general intention to proceed in the cause. 3 *Smith's Rep.* 101. *Smith v. Paul*.

for four terms, a term's notice is not necessary. See N. on R. M. 4 *Ann.* (c)

Notice may be given after the *essoign* day, but before the first day in full term. I have this from the master. See 1 *Str.* 211. When the notice may be delivered.

A defendant resided upwards of forty miles from *London*, but pending the action removed his habitation nearer, it was held, that eight days were sufficient. If the defendant remove pending the suit.

If defendant before and at the time of the commencement of the action, reside in *London*, eight days notice of executing a writ of inquiry is sufficient, though in the mean time, the defendant has permanently removed above forty miles from *London*, if defendant did not give plaintiff previous notice of such removal. 12 *East*, 427. *Rochford v. Robertson*.

If defendant residing at an hotel in *London*, be arrested, and he continues there till interlocutory judgment signed and notice of inquiry, eight days are sufficient, although he have a house at Abergavenny. *Lloyd v. Hooper*, 7 *East*, 624. (a) If defendant is residing at an hotel.

There must be the same notice of executing a *scire fieri* writ of inquiry, as a common writ of inquiry. *Str.* 235, 623. As to the notice of executing a *scire fieri* writ of inquiry.

If a writ of inquiry be set aside for irregularity, there must be a new writ ingrossed. *Hil.* 13 *Geo.* 1. *Cole v. Vaughan*, *MSS. Rep.* When a new writ will be ordered.

If the jury mistake in point of law, or give too small damages, the court will, on payment of costs, order a new writ. *Str.* 425, 1259. But this must be on a special application.

An inquiry executed on the day of the return is good. 2 *Ld. Raym.* 1449. *Dyke v. Blackston*. If inquiry executed on return day.

Plaintiff became bankrupt between the interlocutory and final judgment, and sued out the execution in his own name. Rule to discharge defendant. The court said, the bankruptcy of the plaintiff did not abate the suit; and that they had in several instances permitted the assignees to continue a suit commenced by the bankrupt in his name. Rule discharged. *Waugh v. Austen*, 3 *Term Rep.* 437. The plaintiff may go on, although he be a bankrupt.

(a) It cannot be executed on a Sunday. 1 *Str.* 387. *Hoyle v. Lord Cornwallis*.

When a writ of inquiry to be executed in London or Middlesex, is to be left at the office.

If rep. concludes to the country.

Ordered, that when any writ of inquiry shall be made or sued out, to be executed in *London* or *Middlesex*, such writ shall be left at the office of the sheriff the day before the execution thereof. *R. Hil. 23 Geo. 3.*

Ordered, that in every case where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper book, and thereupon the defendant, to hinder the trial of the issue, shall demur in law, upon the replication, or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment, the attorney for the defendant shall be obliged to accept of notice of executing a writ of inquiry of damages, from the time of notice of trial given upon the paper book; but then the plaintiff ought to give notice, of the hour, and place of executing the inquiry. *R. Hil. 8 Geo. 1.*

In judgment against three defendants by default, one writ of inquiry sufficient.

Trespass for assault and imprisonment against three defendants, who suffered judgment to go by default: the plaintiff executed three writs of inquiry, and the jury gave three separate damages. Motion in arrest of judgment. Cited 1 *Str.* 422. *Cro. Eliz.* 860. 5 *Burr.* 2790. Whilst this rule was depending, plaintiff moved to set aside his own writ, and that another be issued; it was prayed on the part of defendant that his rule be made absolute. Lord *Kenyon*.—The plaintiff's proceedings are certainly irregular; he has executed three writs of inquiry, where one would have been sufficient; and if he had entered up final judgment for the several damages, it would have been erroneous; but he has discovered his mistake in time, and upon payment of costs, he may set aside his own proceedings. But there is no ground to arrest the judgment. In *Rodney v. Strobe*, in trespass against three, two of whom pleaded, and one suffered judgment by default, the jury found 1000*l.* against one, 50*l.* against the second, and 50*l.* against the last; the plaintiff entered a *nolle prosequi* against the two last defendants, and took his judgment only against the first: it was held, it cured the verdict. *Carth.* 19. *Per Cur.*—Let the rule for arresting the judgment be discharged, and the plaintiff's rule for setting aside his own proceedings on payment of costs, be absolute. *Mitchell v. Millbank*, 6 *Term Rep.* 199.

On notice to execute inquiry at a certain hour, the party is not

Motion to set aside a verdict on inquiry for irregularity: the irregularity complained of was, that notice was given to attend the execution between 10 and 12, that the

defendant and his witnesses attended till 12, and that hour was elapsed, and they were gone; the writ was executed. The court discharged the rule, saying, it was a trick to leave the place immediately after the hour was passed: when notice is given for a certain hour, it is never understood to be scrupulously adhered to. The sheriff may have prior business, which may last beyond the hour. Rule discharged. *William v. Friih, Dougl.* 197.

If either party propose to attend by counsel, he should give notice thereof to his adversary, or he will not be allowed for it in costs.

If counsel are to attend, notice to be given.

And it is said the sheriff may *adjourn* the execution of the inquiry, after it is entered upon, 2 *Str.* 853, 1259. but there must be good reason for this. The first case the Chief Justice adjourned, and the second was a new inquiry ordered on account of the smallness of the damages, no witnesses having attended.

Sheriff may adjourn the execution after entered upon.

If the plaintiff do not proceed to execute the inquiry pursuant to his notices, or countermand in due time, the defendant will be entitled to his costs of his witnesses, and expences to be taxed by the master. There must be an affidavit of attendance, &c. *Sutton v. Bryan*, 2 *Str.* 728. R. H. 8 *Geo.* 1. 1 *Str.* 317. *Stradford v. Houstoun*.

When costs for not executing are to be allowed to defendant.

It is moved on the affidavit, and absolute in the first instance for the master to examine the matter and tax the costs, if it shall appear that costs ought to be paid. Counsel 10s. 6d.

How moved for.

Take notice, that a writ of inquiry of damages in this cause will be executed on the day of instant, between the hours of 11 in the forenoon and one of the clock in the afternoon of the same day, at the Secondaries Office, No. 57, in *Coleman-street, London*. Dated the day of 1817.

Notice of executing inquiry in London.

Yours, &c.

J. K. Plaintiff's attorney.

To Mr. C. D. attorney for defendant.

If it is in *Middlesex*, say, between the hours of eleven of the clock in the forenoon, and one of the clock in the afternoon, of the same day, at the Sheriff's Office, in *Bedford-street, Bedford-row, near Holborn*, in the county of *Middlesex*.

In *Middlesex*.

If in the country, say, "will be executed on, &c. at the house of L. W. commonly called or known by the name try.

If in the country.

“ or sign of the in the High-street, Oxford, in the
“ said county.”

What the notice is to express. The notice should express *the name of the house, the county, town, and street*, and the *time* between hour, and hour must not be above two; and notice to execute by ten uncertain. *Str. 1142. Ison v. Fowen. (a)*

May countermand. If you do not intend executing the inquiry on the day, you may countermand same, by giving two days notice previous.

Notice of countermand. I do hereby countermand the notice of inquiry given you in this cause. Dated, &c.

Continuance. A notice of inquiry may be continued over to another day, but not more than once in a term. *Str. 1119, Green v. Gifford.* You may continue two days before it is executed, to any other day.

Notice of continuance. I do hereby continue the notice of executing the writ of inquiry given in this cause to the day of next, when the same will be executed between the hours of, &c. at, &c. Dated, &c.

To whom the above notices are to be delivered. Notice of countermand or continuance must be delivered to the agent in town, and not to the country attorney.

Irregularity in notice. Irregularity of notice of inquiry is cured by making a defence on executing the inquiry.

For what inquiry will be set aside. A rule to set aside inquisition executed at the assizes before jurymen, some of whom were debtors taken out of prison for the purpose; the defendant's attorney attended the execution of the writ. *Lord Kenyon.*—My doubt at first was, whether the defendant had not waived taking the advantage of this objection by appearing before the sheriff, but for the precedent's sake we ought to set aside this inquisition: (b) If the sheriff had been made a party to the rule, perhaps the court would have made him pay the costs of the application. Rule abs. *Stainton v. Beadle, 4 Term Rep. 473.* The court held there was no objection to javelin men. *Ibid.*

(a) Notice was given to execute on Tuesday the 14th day of *January* instant, when the 14th fell on a Thursday; the inquiry was executed, and court refused to set it aside. 3 *Bos. and Pul. 1. C. P.*

(b) *Turner v. Clarke, E. 31 Geo. 3. S. P.*

George the third, by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith, &c. To the sheriffs of London, greeting: Writ of inquiry by bill. Whereas A. B. lately in our court before us at *Westminster*, by bill, without our writ, and by the judgment of the same court, impleaded C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself: For that whereas (*set forth the whole declaration verbatim,*) to the said A. B. his damage of 100l. as he saith, and such proceedings were thereupon had in our said court before us, that the said A. B. ought to recover his damages by means of the premises; but because it is unknown to our court before us, what damages the said A. B. hath sustained, therefore we command you, that by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what damages the said A. B. hath sustained, as well by means of the premises aforesaid, as for his costs and charges by him about his suit in this behalf expended, and make appear to us at *Westminster*, on next after (a) the inquisition which you shall thereupon take under your seal, and the seals of those by whose oath you shall take that inquisition, and have there then this writ. Witness, *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign.

Low and Markham.

If by original, say, *by our writ*. The return should be according to the nature of the proceedings; and if by original, on a general return wheresoever; &c. if by bill, on a day certain. If by original.

To be ingrossed on a 5s. stampd parchment, and only sealed; pay 7d. leave it at the sheriff's office for execution, first indorsing on it the day it is to be executed; pay in *London* 1l. 9s. 4d. if no witnesses, and 4d. for every witness; in *Middlesex* 1l. 10s. 4d.; other counties 1l. 11s. 6d.; attend the execution on the day. How to proceed to sue out same.

On the day, you attend the sheriff's deputy and the jury, with evidence to prove the plaintiff's demand, or damages sustained; and the defendant is at liberty to Attendance on the sheriff.

(a) If the writ of inquiry is returnable on a general return day, instead of a day certain, it is not error. *2 Stra.* 917. *Say.* 245.

produce witnesses in mitigation, for the jury must give some damages.

Proof.

The jury may give interest on a note, bill of exchange and money lent; and a promissory note, or bill of exchange, need not be proved, but produced, to see if any money is indorsed or paid off. *Str.* 1149. 3 *Wils.* 155. Defendant shall not give in evidence fraud, for he admits the contract as declared. *Str.* 612. For goods sold, work done, money paid, lent, had and received, you must give evidence. It is not competent to the defendant to controvert any thing, but the sum in demand.

What defendant after judgment, cannot be allowed to set off.

After judgment by default, the defendant cannot be allowed, on a writ of inquiry, to set off in reduction of damages the amount of losses not indemnified. *Caruthers and another v. Graham*, 14 *East*, 578. It was an action to recover *del credere* commissions for guaranteeing sums insured.

If a stipulation is made on policy, that it should be deemed sufficient proof of interest.

Where an action was brought on a policy of assurance on a foreign ship, wherein there was a stipulation that the policy should be deemed sufficient proof of interest, the plaintiff on the writ of inquiry was only bound to prove the defendant's subscription to the policy, without giving any evidence of interest. *Doug.* 315, *Thellusson v. Fletcher*. I should think the subscription of defendant need not be proved on a judgment by default; for by suffering the judgment, the defendant confesses the plaintiff's title to recover the amount.

When damages may be severed, and when not.

If action be against two, and both suffer judgment, the damages cannot be severed. 1 *Str.* 422. But if one demurs, and the other suffers judgment by default, damages may be severed, because they have severed in their plea. *Ibid*, 1140.

When motion in arrest of judgment to be made.

If the defendant moves in arrest of judgment on an inquiry, returnable on the last day of term, he must do it on *that day*. He will have no occasion for the inquiry to be produced on the motion. If on account of an irregularity, he must also move *that day* to set it aside.

Rule for judgment.

On the day of the return, give a rule for judgment at the clerk of the rules, naming your cause on a slip of paper, and writing on it, "Rule for judgment on inquiry." pay 3s. it expires in four days next after it is given. 1 *Salk.* 399. *Sunday* is not reckoned a day. (a) It may be

(a) Costs are taxed of course on an inquiry, although the plaintiff do not recover 40s.

entered at any time within four days after the term, but not after. N. on R. E. 5 Geo. 2. It must be four full court days, a *dies non* is excluded. On expiration of the rule, get the inquisition from the sheriff, carry it to the stamp office, and stamp it with a 10s. stamp, tax the costs with the master, pay 2s. 6d. and defendant may have a rule from the clerk of the rules to be present at the taxing of costs if he thinks fit; pay 6s. 6d. a copy of which is to be served on the attorney for plaintiff; after the costs are taxed the plaintiff may take out execution, if he is not served with an allowance of a writ of error.

The defendant may move to set aside the inquisition, *For what defendant may move to set aside inquisition.* for want of due notice, objection to the jury, or mode of returning them, or that they were returned by plaintiff's attorney, or for excessive damages. 4 T. Rep. 473. Cowp. 112. 2 Leon. 214. 3 Burr. 1846.

In like manner plaintiff may move to set it aside himself, *For what the plaintiff.* when it is obvious damages are too small, except in vindictive, small, or trifling actions. Str. 425, 515, 1259, 940. 2 T. Rep. 361.

If witnesses will not voluntarily attend the execution, *Witnesses.* the party wanting their testimony may make out a *sub-pœna*, which is as follows.

George the third, &c. to (here insert the witnesses names, there may be four in each writ.) We command *Subpœna on inquiry.* you, and every of you, that setting aside all and singular businesses and excuses whatsoever, you, and every one of you, be and appear in your proper persons, before our sheriff of the county of *Middlesex*, on the day of next, at 11 of the clock in the forenoon, at the sheriff's office, Bedford-street, Bedford-row, near Holborn, in the county of *Middlesex*; (if in *London*, say, before our sheriffs of our city of *London*, at the secondaries office, No. 57, in Coleman street, in our city of *London*. If in the country, say, before A. P. esq. our sheriff of the county of *Oxford*, on, &c. at the house of commonly called or known by the name or sign of the in the High-street, *Oxford*, in the said county;) there to testify the truth of all and singular those things, according to the best of your information or knowledge, which you, or any of you know, in a certain cause now depending in our court before us, between A. B. plaintiff, and C. D. defendant, of a plea of trespass on the case (as the action is) on the part of the plaintiff, on which our certain writ of inquiry of damages hath been sent by us, out of our said court, and di-

INQUIRY BEFORE THE CHIEF JUSTICE.

rected to our said sheriff, then and there in due form of law to be executed; and this you, nor any of you, shall in no wise omit, under the penalty of 100l. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of _____ in the 57th year of our reign.

Law and Markham.

To be ingrossed on a 5s. stamp piece of parchment. It must be signed by Messrs. *Provost* and *Chambre*, and sealed; pay signing 1s. 8d. seal 7d. serve witnesses with a copy, pay 1s. each in town, and make a *præcipe* for the office, thus:

Præcipe.

London, to wit: *Subpœna* to testify on inquiry between A. B. plaintiff, and C. D. defendant, on the part of the plaintiff. *J. K.* attorney.

INQUIRY BEFORE THE CHIEF JUSTICE, &c.

THERE are cases upon which a special application may be made to the court to have the writ of inquiry executed before the chief justice at the sittings, or before the justices of assize; but leave is seldom granted, unless the case is very special, as where the law is mixed with the fact, or it appears to be of too much consequence for the sheriff to undertake: in which case it is said that the judge of *nisi prius* is only an assistant to the sheriff, and has no judicial power; and if the parties come to an agreement at the trial, the judge is to sign it, and afterwards the court may be moved to have it made a rule of court. 12 *Mod.* 519, 610. 1 *Str.* 612. 2 *Str.* 852. *Barn.* 233.

The method of applying.

The way to apply is, to make an affidavit, setting forth the circumstances of the parties, plaintiff and defendant, and the nature of the action, on which the court will grant a rule to shew cause, and in case of success, the rule will be that the writ of inquiry be executed before the chief justice, or judge of assize, and for the sheriff to summon a good jury. But I do not think there can be a rule for a special jury in this case granted, if contested, the act not extending to an inquiry; and at all events if there be one granted, yet defendant has no right to pay those fees.

Inquiry and notice.

If the rule is made absolute, a common writ of inquiry directed to the sheriff is made out; and the notice ought to be for the sittings or assizes generally, and not for any particular day. *Barnes*, 135.

The writ of inquiry is sent to the sheriff, and the cause entered with the marshal the same as a record; pay the same fees: the sheriff returns the inquisition as usual, and takes his fees as usual; give a rule for judgment on the return day, and proceed as before. *Salk.* 399.

By consent, in vacation, an order may be obtained from a judge to execute an inquiry before the judge of assize, and he will make an order for the clerk of the rules to be at liberty to draw up a rule for that purpose, on producing counsel's hand. May obtain consent in vacation.

Mr. Justice *Buller* granted an order to execute a writ of inquiry in an action of covenant without an affidavit, where some legal knowledge was necessary, and the damages went for were about 600*l.* *Trin. Vac.* 1791. May be had in covenant.

If executed before the chief justice, he may adjourn it to the next sitting; but if it be on account of the absence of a witness, the plaintiff must pay costs. *Str.* 853. *Coleman v. Mawbey.*

In Action on Bonds, or on any penal Sum, &c.

But in actions on bonds or on any penal sum, for non-performance of covenants, &c. the stat. 8 and 9 *W. 3.* c. 11. s. 8. directs, if judgment shall be given for plaintiff on a demurrer, or by confession, or *nil dicit*, that the plaintiff may suggest on the roll as many breaches as he shall think fit, upon which shall issue a writ to the sheriff of the county where *venue* laid, to summon a jury to appear before the justices of assize or *nisi prius* of that county, to inquire of the truth of those breaches, and to assess the damages, and in which writ there shall be a command to the justices of assize, to make a return thereof to the court where the writ issued. The statute is compulsory on the plaintiff, and he cannot enter up judgment for the whole penalty, as he might have done at common law. 5 *Term Rep.* 540. *Hardy v. Bern*, ib. 538. On stat. of 8 & 9 W. 3. in action on bonds, or on any penal sum, for non-performance of covenants, &c.

And in case the defendant after judgment entered, and before execution executed, shall pay into court to the use of plaintiff, his executors, &c. such damages so to be assessed, with costs, a stay of execution shall be entered upon record; or if by reason of any execution executed, the plaintiff or his executors, &c. shall be fully paid or satisfied all such damages so to be assessed, with costs of suit, and all reasonable charges for executing, the said executors, the body, lands, or goods, of defendant, If defendant after judgment entered, and before execution, pay the damages with costs, execution to be staid.

shall be discharged from the execution to be entered on record; but to remain as a further security to answer to plaintiff and his executors, &c. such damages as may be sustained, for further breach of any covenant in same indenture, deed, or writing contained. See 5 *Term Rep.* 636. *Hardy v. Bern.*

The Cause of the Statute being made.

What bonds are within statute.

Where covenants and agreements are contained in a bond, they are held to be within the statute. 2 *Burr.* 772. 820. *Dougl.* 519. and is compulsory on the plaintiff to proceed in the method prescribed. A bond conditioned for the payment of an annuity, 2 *Burr.* 80. 5 *Term Rep.* 538. 636. 8 T. R. 126. or of money by instalments, 6 *East*, 550; or a bond conditioned to perform an award, 6 *East*, 613. are holden to be within the statute. And in cases where it applies, a suggestion of breaches is necessary, after a plea of *non est factum*. 8 T. R. 255. So after judgment or demurrer on an annuity-bond. *ib.* 126. which may be entered at any time before trial; but where the issue has been previously made up and delivered on such plea, it is irregular to deliver a second issue with a suggestion, without a judge's order obtained. *Ibid.* 255. See *Tidd*, 507.

To what the stat. does not extend.

7 T. R. 300.
3 *East*, 22.

This stat. does not extend to bonds conditioned for the payment of money which are provided for by the stat. 4 *Ann. c.* 16. nor to bail-bonds, 2 *B. and P.* 446. nor to bonds given to the Lord Chancellor by the petitioning creditor; nor where judgment is to the plaintiff on an issue of *nul tiel record*.

After error brought, leave given to execute an inquiry under the stat.

Leave was given to plaintiff in debt on bond conditioned to perform award after judgment, for him, upon a plea of judgment recovered, to execute a writ of inquiry upon the stat. 8 & 9 *W. 3. c.* 11. s. 8. after a writ of error allowed, and to sign a new judgment, on paying costs, and putting defendant in *statu quo*. *Hanbury v. Guest*, 14 *East*, 401.

CONFESSION OF THE ACTION.

IN order to prevent expence, the defendant frequently after declaration comes to some agreement with the plaintiff to pay the debt and costs: the better to secure the plaintiff, his attorney gets the defendant to sign a *cognovit*,

which is called a confession of the action, or *cognovit actionem*.

It may be made in any stage of the cause before trial, When it may or inquiry executed, which confession is written in the be made. margin of the declaration, or it may be done on the writ of inquiry, or on paper, and if the action be in case, it may be thus: (a) *I confess this action, and that the plaintiff hath sustained damages to the amount of 20l. (b) besides his costs and charges, to be taxed by the master; but no judgment shall be entered up, or execution issue, until the day of next, in default of payment of the sum of 10l. being the debt in this action, with the costs. And that no writ of error shall be brought, nor any bill in equity filed: and that in case the plaintiff shall enter up his judgment, he shall be at liberty to levy the said 10l. together with all costs, sheriff's poundage, and all other fees. As witness my hand, &c.*

The costs are usually paid down, otherwise they must be added to the debt. Asto payment-
of costs.

If the confession be in an action of debt, then it may be, If action be
"I hereby confess the debt in this cause, and that the plaintiff hath sustained damages to the amount of 1s. besides his costs and charges, to be taxed by the master to be paid as follows," &c. as above.

If the *cognovit* contains an agreement to take the debt by instalments, it ought to be stamped with a 16s. stamp. If the *cognovit* contains an agreement, &c.
 But a mere *cognovit*, without any matter of agreement does not require a stamp. *Reardon v. Swaby*, 4 East, 188. So in C. P. *Ames v. Hill*, 2 Bos. and Pull. 150.

In case a plea be pleaded, and the defendant would wish to confess the action, the attorney, or his clerk, should attend the master to withdraw it. *Lord Ray*. 345. Cognovit
after plea.
 See title *Retraxit*, p. 485.

(a) Care should be taken that common bail is filed for defendant first, or that the plaintiff file it according to the statute: if the action is bailable, that bail be put in; see 7 Term Rep. 206. *Davis v. Hughes*; though defendant is estopped by the confession from objecting to the irregularity, if the plaintiff has filed it *nunc pro tunc* before the time of the objection.

(b) Take it in double the sum.

Where the plaintiff had taken a *cognovit* from the defendant, with an agreement to receive the debt by long instalments, of which no notice was given to the bail, the court will set aside an execution against the bail sued out above a year after the judgment, without a *sci. fa.* to revive, even if the agreement by the plaintiff to take the debt by instalments without the consent of the bail, would not have discharged them, as they could not after that have rendered their principal. And *Bayley, J.* said, that the plaintiff could not give a partial indulgence to the principal without the consent of the bail, and that if he did, it discharged them; for the bail after this could not have rendered the principal. *Thomas against Young and Jogget, bail of Graham, 15 East, 617. See 5 T. R. 277.*

If a *cognovit* be taken from a prisoner, an attorney for him should be present. *3 Term Rep. 616. Parkinson v. Caines.*

Bill to be first filed.

In *Walker v. Wooley, 7 Term Rep. 207, H. 37 Geo. 3.* it is said, that judgment had been signed upon a *cognovit*, without first filing a bill; which was holden to be irregular; but it having been done at the request of the defendant to save expence, the court granted leave to file the bill, *nunc pro tunc*, and directed the defendant to pay all the costs. I think the defendant in this case was an attorney. I never knew the practice to be so in any other case, unless a writ of error had been brought.

How to sign judgment after confession.

If the confession is, after the entries have been paid, that the judgment shall be entered up, sign it on a 10s. stamp paper, as it is final; but you do not pay for the entries anew, nor is there occasion for a new roll; pay 2s. 6d. for the secondary's fee, and 6d. for the further entry of the judgment, and make the entry on the judgment paper as far as the end of the memorandum, and the names of the parties in the declaration.

How if *cognovit* be taken before the entries are paid for.

If the *cognovit* be taken before any of the entries are paid for, then sign the judgment the same as on a warrant of attorney.

RETRAXIT OF PLEA.

It is very common, after plea pleaded, to confess the action: in this case, in the confession it is necessary to add, that defendant consents to withdraw his plea, and that plaintiff may take judgment, in order that a *retraxit*

may be entered by the master; who will not do it *unless the attorney for the defendant be present, or a known clerk.*

Enter all the pleadings on the roll, with the relinquish- How to pro-
ment of the defendant's plea; take the same to the clerk ceed.
of the judgments, who will enter them, and sign the
judgment on a 10s. stamp, then go to the master, and
he will enter the *retraxit* on the margin of the roll, but
the entry on the roll must be complete. If the roll is
gone in, then bespeak it of Mr. Edge, who will bring
it to the master.

Formerly it could not be done if defendant did not ap-
pear in person. 2 Cro. 211. 8 Co. 586. 1 Salk. 89.

ENTERING JUDGMENT ON WARRANT OF ATTORNEY.

It happens frequently, that after the defendant is ar-
rested and proceeded against, the plaintiff in order to
prevent further litigation, accepts a warrant of attorney
for his demand, with a defeazance payable by instal-
ments.

The warrant of attorney authorizes the attornies to
whom it is directed, to appear for the defendant, and re-
ceive a declaration, in an action to be brought against
him, and thereupon to confess the same action, or suffer
judgment therein to pass against him by default.

The warrant of attorney is frequently given where no
action is depending, to compromise the difference be-
tween the parties, and that the defendant may be bound
to pay the plaintiff his demand immediately, or at a stated
day to be mentioned in the defeazance.

It is now liable to the stamp duty of 1*l.* only, although Stamp duty.
it contains a release of errors; but the defeazance which
is indorsed on the back of the warrant, or in the margin,
does not require a separate stamp. 1 N. R. 279.

To E. F. G. H. & J. K. Gentlemen, attornies of Form of war-
his majesty's court of King's Bench at *Westminster*, rant of attor-
jointly and severally, or to any other attorney of the ney to confess
same court. judgment.

These are to desire, and authorize you the attornies
above named, or any one of you, or any other attorney
of the court of King's Bench aforesaid, to appear for me
C. D. of, &c. in the said court as of this present
term or any other subsequent term, and then, and there,

to receive a declaration for me in an action of debt for £ for money borrowed at the suit of A. B. his executors or administrators, and thereupon to confess the same action, or else to suffer a judgment by *nil dicit*, or otherwise to pass against me in the same action, and be thereupon forthwith entered up against me of record of the said court for the sum of £ besides costs of suit. And I the said C. D. do hereby further authorize and empower you the said attornies, or any one of you after the said judgment shall be entered up as aforesaid for me, and in my name, and as my act and deed, to sign, seal and execute a good and sufficient release in the law to the said A. B. his heirs, executors, and administrators, of all and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all misprisions of error and errors, defects, and imperfections whatsoever had, made, committed, done, or suffered in, about, touching or concerning the aforesaid judgment, or in, about, touching or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever, of or any way concerning the same, and for what you the said attornies, or any one of you shall do, or cause to be done in the premises or any of them, this shall be to you and every of you a sufficient warrant and authority. In witness whereof I have hereunto set my hand and seal the day of in the 57th year of the reign of our sovereign lord Geo. 3. by the grace of God, of the united kingdom of *Great Britain and Ireland* king, defender of the faith, and in the year of our Lord 1817.

Sealed and delivered, being first duly
 stamped, in the presence of } C. D.
 L. M. }

Defeazance
 thereon.

A. B. } Memorandum, that the within warrant of at-
 v. } torney is given, for securing the payment, from
 C. D. } the within named C. D. to the within A. B. of
 the sum of £ and interest, on the days, and in
 manner following, that is to say, the sum of £ part
 thereof, together with the interest for same on the
 day of and the further sum of £ residue
 thereof, together with interest for the same on the
 day of and it is agreed by the said parties, that
 no action, execution, or other process, shall be com-
 menced, sued out or prosecuted against the said C. D.
 his heirs, executors, administrators, lands, goods, and
 chattels, upon the judgment to be entered up, in pur-

suance of the within warrant until default shall happen to be made in payment thereof. As witness our hands the day and year within written.

Witness,

L. M.

A. B.

C. D.

In case the defendant be in the custody of the marshal or any gaoler, the following rule must be observed.

It is ordered by the court, that no bailiff nor sheriff's officer shall presume to exact nor take from any person, being in his custody by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto; which said warrant shall be produced when the said judgment shall be acknowledged. And if any bailiff or sheriff's officer shall hereafter offend, or do contrary wise, he shall be severely punished for so doing: and it is further ordered, that no attorney shall from henceforth acknowledge or enter, or cause to be acknowledged or entered, any judgment by colour of any warrant gotten from any defendant being under arrest, otherwise than as aforesaid. *E. 15 Car. 2.*

No bailiff to take a warrant of attorney but in presence of attorney.

Upon this rule it was deemed sufficient for the plaintiff's attorney to be present, and subscribe the warrant, as attorney for the defendant. *5 Mod. 144.* And therefore another rule was made that no warrant of attorney, for confessing a judgment executed by any person in custody, shall be valid or of any force, unless there be present some attorney in behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature of such warrant before the same is executed, who shall subscribe his name as a witness to the due execution. *R. E. 4 Geo. 2.*

Some attorney to be present on behalf of defendant.

These rules extend to warrants of attorney executed abroad; and the court said, the plaintiff, if he would make use of this court, must conform to its rules; comparing it to the case of stamping foreign deeds, before they can be read here. *2 Str. 1247. Fitzgerald v. Plunket.*

Extends to those executed abroad.

An attorney, whether of the one court or the other, is sufficient. *Bland v. Pakenham, 1 Str. 530.*

After interlocutory judgment, the plaintiff's attorney took a *cognovit* for 200l. of defendant in custody of the Marshal at a plaintiff, with a defence for 49l. 12s. and 8l. 5s. costs. The defendant at the time objected to signing it, and desired it might be shewn to his attorney; but on plaintiff's attorney telling him, that it was unnecessary, he signed it, no attorney on his behalf being

A cognovit taken of defendant in custody without presence of his attorney, bad.

present. Motion to set aside the proceedings for irregularity. The court said, this case was not strictly within the rule of *E. 15 Car. 2*. They thought the plaintiff's attorney had acted improperly in taking a *cognovit* for 200l. notwithstanding the defeazance, as no attorney was present on behalf of defendant, and were about to make the rule absolute on that ground, when *Gibbs* suggested, as the rule was drawn up on the ground of irregularity, the defendant was not strictly entitled to make it absolute on the latter ground; but he offered to have the judgment altered to 49l. 12s. instead of 200l. the plaintiff paying the costs of the application, by allowing it out of the debt, which the court ordered. *Parkinson v. Easner*, 3 *Term Rep.* 316.

Construct. of
rule, *E. 15*
Car. 2.

This rule does not extend to cases where the defendant is in custody upon an execution, but only where he is in custody upon mesne process. The reason of this distinction is, that where a man is arrested upon mesne process, the debt is not liquidated, and therefore under duress, he may be prevailed upon to confess more than is really due; but upon an execution the debt is liquidated, and therefore the only purpose of defendant's giving a warrant of attorney in such case is, to procure his liberty. See same point, 7 *Term Rep.* 19. *Crompton v. Steward*.

If indeed it could be shewn that a party even in execution had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief under the circumstances; because cases of fraud and imposition are exceptions to all rules. *Fell v. Riley*, *Cowp. Rep.* 281.

Though defendant
consent to plaintiff's
attorney, it will not do.

The presence of the plaintiff's attorney is insufficient, though the defendant consent to his acting as his attorney also. *Hutson v. Hutson*, 7 *Term Rep.* 7. For the object of having an attorney is, to explain the nature of the instrument, and to advise the defendant confidentially and as a friend. *Ibid.* 8.

When no necessity for an
attorney to be present.
Nor when a
prisoner is in
execution, has
paid part of
the debt, and
executes a
warrant of
attorney for

It was declared that the general rule of *E. 15 Car. 2*. about the necessity of an attorney for the defendant being present, whenever a person in custody gives a warrant of attorney to confess judgment, is confined to judgment in the particular cause whereupon he is in custody, and does not extend to warrants of attorney given to confess judgment in other actions; for in the first case, the attorney being present, is to avoid all practices on the part of the plaintiff, and to see it is done without duress or imprisonment; in the other, the plaintiff has no power over

the defendant. 3 Burr. 1793. *Holcombe v. Wade*. 2 Ld. the residue, Raym. 797. 5 Mod. 144. Cowp. 142. S. P. *Smith v. 2 Stra.* 1245. *Burton*, 1 East, 241.

Ordered that no judgment be signed upon any warrant of attorney to confess judgment, without such warrant being delivered to, and filed by the clerk of the dockets; who is hereby ordered to file the same in the order received.—That every attorney of this court, who shall prepare any warrant of attorney to confess any judgment, which is to be subject to any defeazance, do cause such defeazance to be written on the same paper, or parchment, on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeazance. R. M. 42 Geo. 3.

To whom it is to be delivered.

As to the entry of the defeazance.

If the attorney employed to prepare a warrant of attorney to confess judgment which is to be made subject to a defeazance, neglect to insert such defeazance on the warrant which is required by the above rule, the security is not thereby avoided against the innocent party, but the attorney is guilty of a breach of duty imposed on him by the court, and is answerable for it on motion. *Shaw v. Evans*, 14 East, 576.

If defeazance be omitted.

The court will order a warrant of attorney to confess judgment, to be delivered up, if obtained by fraud, before any use has been made of it; *Buller J.* observing, that the court had the same jurisdiction as if the judgment had actually been entered up. If it were otherwise, he said, the consequences would be extremely inconvenient; for the judgment might be entered up in the vacation, and defendant taken in execution, before any application could be made to the court. *Doug. Rep.* 196. *Duncan v. Thomas*.

If obtained by fraud.

So if given for a corrupt or usurious consideration, or for securing an annuity, which is void by the annuity act, or to induce the plaintiff to live in prostitution with defendant. 1 H. Bl. 75.

If obtained on an usurious consideration.

If given by an infant, court will order it to be delivered up. 1 Str. 20. But where a *feme covert* gave one, and afterwards moved to set aside the judgment because she was *covert*, court would not relieve her, but put her to her writ of error. 1 Salk. 400.

If by an infant.

The court will not set a warrant of attorney aside, on account of its being given by a defendant in custody, without an attorney being present on his part, if executed.

Will not set it aside, if given with a view to cheat.

ted by the defendant purposely with a view to cheat the plaintiff. *Gilman v. Hill*, *Comp. Rep.* 141.

A warrant to confess, executed by a prisoner on a criminal process, is good.

Not revocable.

At the time warrant of attorney was executed, defendant was in custody under criminal process, and not against plaintiff: motion to set it aside. Court held, the rule did not extend to this case, and discharged the rule. *Charlton v. Fletcher*, 4 *Term Rep.* 433.

By the course of the court, a warrant of attorney to confess a judgment is not revocable; and if the party endeavour to revoke it, the court will notwithstanding give the other party leave to enter up judgment. 2 *Ld. Ray.* 766, 850. But the death of either party is, generally speaking, a countermand of the warrant of attorney. Therefore if it appear to the court, that either party is dead, they will not grant the motion. 2 *Str.* 718. 8 *T. R.* 257. *Cowie, ex. v. Allaway*, 2 *Str.* 1081.

When to enter it up if defendant dies.

Woodward gave a warrant of attorney to confess a judgment, and died within a year after in time of vacation, before the essoign day of the subsequent term, which was *Easter* term; the attorney, after his death, entered up the judgment as of the preceding term, but brought not the roll in before the essoign day of *Easter* term; and it was moved to have the judgment set aside, the warrant of attorney being revoked by the death of the party. *Holl. C. J.* If the party dies in the vacation, the attorney may enter up judgment that vacation, as of the preceding term, and it is a judgment at the common law, as of the preceding term, though it be not so upon the statute of frauds in respect to purchasers, but from the signing; so this judgment is good. *Oates v. Woodward*, 1 *Salk.* 87. 2 *Ld. Ray.* 766. 2 *Str.* 882. *Fuller v. Joostlyn*.

Defendant died before motion to enter up judgment.

On the 12th of *November*, about twelve at noon, motion to enter up judgment on an old warrant of attorney, was moved for on the usual affidavit, and court made the usual rule. Motion on another day to discharge it, on affidavit that defendant died the day the first motion was made, at seven in the morning. The court declared, that if it had then appeared that the man was dead, they would not have made the rule; but they applied the maxim *fieri non debet, factum valet*, to this case, and suffered the deceit to prevail. *Chancy v. Needham*, 2 *Str.* 1081.

How to enter it up, if given to a feme sole.

If a warrant of attorney is given to a *feme sole*, and she marries before judgment entered up, application must be made to the court, for leave to enter it up, by the husband and wife, founded upon an affidavit, proving their

marriage. 3 *Burr.* 1469. *Marder and Ux. v. Lee.* If in vacation, it may be done by a judge's order.

If a warrant of attorney be given to two, and one dies before judgment entered, leave will be given to the survivor to enter it up. 1 *Wils.* 312. *Todd v. Dodd.* 2 *Maule and Selw.* 76. If to two, and one dies.

A joint warrant of attorney given to enter judgment upon a joint and several bond, will not authorize the entering up judgment against the survivor only. *Gee v. Lane,* 15 *East,* 892.

A married woman, though a *feme sole trader*, cannot give a warrant of attorney to confess a judgment. *Caudell v. Shaw,* 4 *Term Rep.* 363. Such a woman gave a warrant of attorney, and the judgment was set aside. *Ibid.* 362. *Read v. Jewson.* Feme covert.

The warrant given by one executor, will not justify the entering a judgment against all. 1 *Str.* 20. *Elwel v. Quash,* *et al.* Warrant by one executor.

A warrant of attorney and release of errors is good in one instrument. *Ibid.* 1215. *Landon v. Pickering.*

Leave will be given to enter up a judgment on an old warrant of attorney, at the suit of an executor, if the words are, *at the suit of the plaintiff, his executors, &c.* after the death of the plaintiff, but not otherwise. *Barnes,* 44. *Salk.* 399. 8 *Term Rep.* 257. When judgment may be entered after plaintiff's death.

In *Easter* term 1791, *Shepherd* obtained a judgment against one *Charter*, who brought error, and delayed execution until *Easter* term 1792, when judgment was affirmed. On the 7th of *May* the costs in that suit were taxed, requesting time, but refused. On the 8th, *Charter* knowing *Shepherd's* intention to take out execution, which he was entitled to sue out that day, went to plaintiff *Holbird*, who was a creditor, informed him of his situation, and executed a warrant of attorney, on which judgment was immediately entered up, and execution sued out and delivered to the sheriff, two hours before *Shepherd's* execution reached the sheriff's office. The sheriff levied under *Shepherd's* execution, and returned *nulla bona* to the plaintiff's. Action for false return to *fi. fa.* against *Charter*. Lord *Kenyon* said, this was not an undue preference, and plaintiff had a verdict. Motion to set it aside, saying the warrant of attorney was void by 13 *El. c.* 5. Lord *Kenyon*.—There was no fraud in this case. The plaintiff was preferred by his debtor *Charter*, not with a view of any benefit to the latter, but merely to secure

the payment of a just debt to the former, in which I see no illegality or injustice. The words of the statute do not apply to this case; the warrant was given on a good consideration; and the other words in the act, "*bona fide*" only apply to those cases where possession is not delivered, or where it is merely colourable. Rule disch. *Holbird v. Anderson*, 5 Term Rep. 235.

If warrant of a particular term, when judgment must be entered.

If a warrant be given to appear and confess judgment of a particular term, the judgment must be entered of that term, and not of any other. 7 Mod. 53. But if it state a term, and also of a subsequent term, it may be entered of that stated, or any other subsequent term. *Ibid*.

Where defendants gave a warrant of attorney to secure a sum certain to be paid half yearly by instalments, with interest on specified days, and that the plaintiff should be at liberty to enter up judgment thereon immediately, but no execution to be issued, till default made in payment of the said sum with interest as aforesaid, by the instalments, and in the manner hereinbefore mentioned. Held, that the plaintiff might take out execution for the whole on default in payment of the first instalment. *Leveridge against Forty, and another*, 1 Maule and Selw. 706.

If entered on a mutuum, instead on bond, will be set aside.

If a plaintiff enter up judgment in debt on a mutuum, on a warrant of attorney given to enter up judgment in debt on bond, the court will set it aside as irregular. *Paris v. Wilkinson*, 8 Term Rep. 153. The authority must be strictly pursued.

When judgment may be set aside.

A judgment entered up by an attorney's clerk, who used the name of a regular attorney, but without his knowledge, or consent, was set aside. *Hopwood v. Adams*, 5 Burr. 2660.

A judgment was entered up on a warrant of attorney ats. of the executor, as of the preceding term when testator was living, held irregular, 2 Str. 1121. for the attorney could have no authority in that term, at the suit of the executor, and the judgment must be considered as of that term, though to other purposes, the day of signing is material.

When Motion necessary to enter up the Judgment.

In term.

Within a year and a day next after the date of the warrant of attorney, judgment may be signed without applying to the court or a judge; but if not signed within

that time, in term time, the court must be moved for leave to enter up the judgment on an affidavit of the debt being due, the due execution of the warrant of attorney, and that the defendant is alive; and the court expect to be informed when the defendant was alive; and any time within a week or ten days from the swearing the affidavit, if the party lives in the country, is sufficient: if in town, two or three days; an affidavit that he was alive on or about a particular day is not sufficient. If the application be made to the court, it should appear that the defendant was alive during the same term.

The rule is absolute in the first instance, unless the warrant of attorney be above twenty years old, and then it is a rule nisi; but where, upon such warrant of attorney the party had admitted the debt within two months preceding the motion, the court granted the rule absolute in the first instance. *Blakely v. Vincent*, T. 35 Geo. 3.

When the rule is made absolute in the first instance.

If the warrant of attorney be above ten years old, the motion must be made in court, on the like affidavit, for years old. a judge will not make an order in vacation.

The judgment should be docketed forthwith, or it will not bind the executors against the payment of other demands, such judgments being on a level with simple contract debts. *Hickey v. Hater*, 6 Term Rep. 384.

Judgment should be docketed.

The plaintiff, 19th of May, 1795, in Easter vacation, signed judgment on warrant of attorney; the defendant died the 5th of May in Easter term, and execution issued tested on the last day of that term. Judgment not docketed till 9th of June; the court held the judgment regular, but set aside the execution, saying, plaintiff should have sued out a *sci. fa.* *Heapy v. Parrie*, 6 Term Rep. 368. But if the execution had been tested in his life-time, 12 Mod. 5. 2 Ld. Ray. 850. 7 Mod. 95. *Gilb. Ex.* 15, 16. 1 Mod. 188. *Comb.* 33. it would have been good.

If defendant die in term, and judgment entered in vacation, it is good; but execution tested last day of term will be set aside.

If the warrant of attorney be not above ten years old, an application may be made to a judge in vacation for leave to enter up the judgment on the usual affidavit, which is afterwards filed with the clerk of the rules.

When application may be made for leave to enter up judgment.

If judgment is to be entered up in the vacation, take the affidavit to a judge's chambers, who will make an order to enter up same; pay 6s. 6d. no counsel's hand is requisite.

How to apply in vacation.

If it be entered up in term, you indorse on the affidavit to move to enter up judgment, on an old warrant

How in term

of attorney ; give same to counsel with a fee of 10s. 6d. In the evening draw up rule at the clerk of the rules, pay 7s. 6d. if a country affidavit, 2s. filing; then sign judgment, as hereafter.

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

Affidavit of
the debt and
execution of
the warrant of
attorney, and
that defend-
ant is alive.

* here follows
the words of
the warrant of
attorney.

A. B. of, &c. the above-named plaintiff, and E. F. of, &c. gentleman, severally make oath, and say, and first this deponent A. B. for himself saith, that the above-named defendant C. D. being justly indebted unto this deponent in the sum of l. for money paid for the defendant, did, in order to secure unto him the same, execute unto this deponent a warrant of attorney, bearing date the day of thereby authorising certain attornies therein named, or any other attorney of this court, to appear for him the said C. D. as of the then last *Michaelmas* term, or any other subsequent term, and then and there to receive a declaration for him in an action of debt, for 40l. for a money borrowed, at the suit of this deponent, and to confess the same action, or else to suffer a judgment by *nil dicit* or otherwise, to pass against him in the same action, and to be thereupon forthwith entered up against him of record in this court. And this deponent further saith, that there is justly due and owing to him this deponent, for principal money and interest thereof, the sum of l. (or the sum of l. the defendant having paid the sum of l. part thereof, as the case is); and that he verily believes the said defendant is living. he this deponent having seen and conversed with him on the day of instant. And this deponent E. F. for himself saith, that he was present, and did see the said warrant of attorney executed by the said defendant, and that the name C. D. set and subscribed at the foot thereof, is of the proper hand-writing of the said C. D. and that he did sign, seal, and as his act and deed deliver the same, in the presence of this deponent; and that the name of E. F. set and subscribed as the witness thereto, is of the proper hand-writing of this deponent.

Sworn, &c.

A. B.
E. F.

What must
be stated in
affidavit.

In order to obtain leave to enter up judgment on an old warrant of attorney, it must be sworn that the defendant was alive on a *full* day in term; the *essoign* day is not sufficient. *Eyles v. Warren*, 4 *Macle and Selw.* 174.

The judgment is signed upon a 10s. stamp paper, (a) *How to sign judgment.* and common bail must be filed. R. H. 1 W. & M. And a memorandum or minute must be filed on a 5s. stamp with the clerk of the bails, as directed by the stat. 25 Geo. 3. c. 80; first enter the warrants of attorney on the roll, then the memorandum of the term you sign the judgment. See the whole entry, title *Judgment*.

The affidavit is to be sworn before a judge, in town; if in the country, before a commissioner of this court. Before whom the affidavit is to be sworn.

It has been held, that an affidavit sworn before a justice of peace at *Edinburgh* is insufficient, *Knight v. Hennel*, M. 46 Geo. 3. It should have been sworn before a lord of session. *Sinclair, v. Assignees of Rentoul*, M. 23 Geo. 3. *Idd*, 6 Ed. 579. In Scotland to be sworn before a lord of session.

In the King's Bench.

A. B. is retained to enter up judgment on a cognovit (or warrant of attorney to acknowledge judgment, as the case may require.) At the suit of C. D. against E. F. Dated on the day of The memorandum or minute.

Entered or filed of record, this A. B. attorney, (if an agent add) day of by G. H. his agent. 57th Geo. 3.

The defendant was in execution in September, 1785, a commission issued, and he was declared bankrupt. If a bankrupt to gain his liberty execute a new warrant of attorney, and bond for the same debt, it is an extinguishment of the old debt, and he shall not be discharged, although he had his certificate. Soon after, and to obtain his liberty, he gave plaintiff a bond and warrant of attorney to confess judgment for the old demand. That being put in force, motion why he should not be discharged out of custody, he having obtained his certificate. The ground was, that no attorney was present at the execution of the warrant of attorney; or supposing it to be good, yet the debt might have been proved under the commission. *Per Cur.*—This is certainly to be considered in the light of a new debt, arising upon a new consideration, because the bond and warrant were given in order to procure defendant's liberty. The old debt was thereby extinguished. Rule disch. *Birch v. Sharland*, 1 Term Rep. 715.

(a) The warrant of attorney is to be left with the clerk of the dockets, who is to file the same. Therefore you will keep a copy of it before filed.

When the court will direct an issue.

The court will, if a warrant of attorney is given for an usurious debt, direct an issue to try the same. *Cor v. Jones, Cowp. Rep. 727.* as there can be no plea to a *scire facias* of this sort.

JUDGMENTS. (a)

ENTRY on the roll of an interlocutory judgment, award of inquiry, and final judgment thereon, where declaration is of a former term (by bill.)

As yet of the term of the *Holy Trinity*, in the 57th year of the reign of King George the third. Witness *Edward Lord Ellenborough*, 1817.

Warrant of attorney for plaintiff.

London, (ss) A. B. (the plaintiff) puts in his place, J. J. his attorney, against C. D. (the defendant,) in a plea of trespass on the case.

For defendant.

London, (ss) The said C. D. in his own person, at the suit of the said A. B. in the plea aforesaid.

Memorandum.

London, (ss) Be it remembered, that in *Easter* term last past, before our lord the king at *Westminster*, came A. B. by J. K. his attorney, and brought into the court of our said lord the king before the king himself, then there, his certain bill against C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words; to wit, *London, (ss)* A. B. complains of C. D. (*here insert the whole declaration verbatim to the word suit, &c. then in a new line add the judgment as follows.*)

Imparance.

And now at this day, (that is to say,) on *Friday* next after the morrow of the *Holy Trinity*, in this same term, until which day the said C. D. had leave to imparle to the said bill, and then to answer the same, &c.

Judgment

at which day, before our said lord the king at *Westminster*, comes as well the said A. B. by his said attorney, as the said C. D. in his own person, and the said C. D. defends the wrong and injury when, &c. and says nothing in bar or preclusion of the said action of the said A. B.

(a) On postea and inquiries, Mr. *Edge*, on being paid enters on the roll the judgments, which he draws himself,

by which the said A. B. remains therein undefended against the said C. D. for which the said A. B. ought to recover against the said C. D. his damages by occasion of the premises; but because it is unknown to the court of our lord the king now here, what damages the said A. B. hath sustained, by reason of the premises aforesaid; it is therefore commanded to the sheriffs, that by the oath of twelve good and lawful men of their bailiwick they diligently inquire what damages the said A. B. hath sustained, as well by the means aforesaid, as for his costs and charges by him about his suit in this behalf expended; and that they send the inquisition which they shall thereupon take to our lord the king at *Westminster*, on

If in Middlesex, say sheriff.

next after under their seal, and the seals of those by whose oath they shall take the said inquisition, together with the writ of our said lord the king, to them thereupon directed; the same day is given to the said A. B. at the same place, (a). At which day before our said lord the king at *Westminster*, came the said *John*, by his said attorney, and the sheriffs, to wit,

Sheriff's inquisition, state it exact.

and sheriffs of the said city, returned a certain inquisition indented, taken before them at

in the same city, on the day of in the 57th year of the reign of our sovereign lord the now king, by the oath of twelve honest and lawful men of their bailiwick; by which it was found, that the said A. B. hath sustained damages, by occasion of the premises, over and above his costs and charges, to l. and for those costs and charges to twenty-nine shillings and four pence. Therefore it is considered that the said A. B. recover against the said C. D. his damages aforesaid, by the said inquisition above found; and also £. for his said costs and charges by the court of our said lord the king now here, adjudged of increase, to the said A. B. and with his assent; which said damages, costs and charges, in the whole amount to l. and the said C. D. in mercy, &c,

If the declaration be of one term, and the interlocutory

If declaration be of one term, and the judgment of another term.

(a) It is not necessary for the practiser to go on further with his entry than this, as the clerk of the treasury will on leaving the inquisition with him complete the judgment.

judgment of another, there must be an imparlance entered, so as to continue the pleadings over from the delivery of the declaration, to the signing of the judgment.

But if the declaration and the judgment be of the same term, then an imparlance is not necessary, and the entry will be thus:

As yet of the term of the Holy Trinity, 57 Geo. 3.
Witness *Edward Lord Ellenborough*, 1817.

Middlesex, to wit. A. B. puts in his place J. K. his attorney, against C. D. in a plea of trespass and assault.

Middlesex (ss) The said C. D. puts in his place J. B. his attorney, at the suit of the said A. B. in the plea aforesaid.

The first day
of term.

Middlesex, } Be it remembered, that on *Friday*
to wit. } next after the morrow of the Holy
Trinity, in this same term before our lord the king, at
Westminster, comes A. B. by J. K. his attorney, and
brings into the court of our said lord the king, before the
king himself now here, his certain bill against C. D.
being in the custody of the marshal of the Marshalsea
of our lord the now king before the king himself, of a plea
of trespass and assault (*as the action is*) and there are
pledges for the prosecution, to wit, *John Doe* and
Richard Roe; which said bill follows in these words, to
wit, *Middlesex*, to wit, (*here enter the declaration verba-
tim to suit, &c. then on a new line add the judgment thus*):

Judgment.

And the said C. D. by J. B. his attorney, comes and
defends the force and injury, when, &c. and says nothing
in bar or preclusion of the said action of the said A. B.
whereby the said A. B. remains therein undefended against
the said C. D. for which the said A. B. ought to recover
against the said C. D. his damages by occasion of
the premises: but because it is unknown to the court of
our lord the king, now here, what damages the said A. B.
bath sustained by reason of the premises aforesaid; it is
therefore commanded to the sheriff, that by the oath of
twelve good and lawful men of his bailiwick, he dili-
gently inquire, &c. (*as in the former one.*)

Entry of a
judgment on
a warrant of
attorney on a
mutuatus.

(a) *London* (ss.) A. B. puts in his place E. I. his attorney
against C. D. in a plea of debt.

(a) Put the term at the top, as in the first precedent
“as yet of,” &c.

London, (ss) The said C. D. puts in his place T. G. his attorney, at the suit of the said A. B. in the plea aforesaid.

London, (ss) Be it remembered, that on *Friday* next after the morrow of the Holy *Trinity*, in this same term before our lord the king at *Westminster*, comes A. B. by I. K. his attorney, and brings into the said court of our said lord the king, before the king himself, now here, his certain bill against C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of debt; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit, *London, to* wit, A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said A. 40*l.* of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas the said C. on the day of in the year of The date of our Lord 18 at *London* aforesaid, to wit, in the parish warrant of of *St. Mary le Bow*, in the ward of Cheap, borrowed of the said A. B. the said 1. to be paid to the said A. when he the said C. should be thereto afterwards requested; yet the said C. (although often requested, &c.) hath not yet paid the said 1. above demanded, or any part thereof, to the said A. but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the said A. his damage of 10*l.* and therefore he brings his suit, &c. (a)

And the said C. by T. G. his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said A. by which the said A. remains therein undefended against the said C. Therefore it is considered, that the said A. recover against the said C. his said debt, and also 80*s.* for his damages which he hath sustained, as well by occasion of the detaining the said debt, as for his costs and charges, by him about his suit in this behalf expended, by the court of our lord the king now here adjudged to the said A. by his assent, and the said C. in mercy, &c.

Judgment by
nil dicit.

(a) If the warrant be to enter up the judgment on bond, the declaration in that case must be upon the bond, for which see title *Declaration*; then follows the judgment.

If it is upon an old warrant of attorney, the matter will tax the costs.

Judgment by non sum informatus.

And the said C. by J. K. his attorney, comes and defends the wrong and injury, when, &c. and the said A. prays that the said C. may answer to his said declaration, whereupon the said attorney of the said C. says, that he is not informed by the said C. of any answer to be given for the said C. in the premises, nor does he say any thing in bar or preclusion of the said action of the said A. by which the said A. remains therein undefended against the said C. Therefore it is considered that the said A. recover against the said C. his said debt, and also (as in the other).

Judgment by cognovit actionem in case, where the defendant acknowledges the debt.

And the said C. D. by J. T. his attorney, comes and defends the wrong and injury, when, &c. and says, That he cannot deny the said action of the said A. B. nor but that he the said C. D. did undertake and promise, in manner and form as the said A. B. hath above thereof complained against him; nor but that the said A. B. hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, to l. as he the said A. B. hath above in his said declaration supposed: and hereupon the said A. B. prays that the said damages so acknowledged, together with his expences and costs, laid out by him about his suit in this behalf, may be adjudged to him, &c. Therefore it is considered, That the said A. B. recover against the said C. D. his damages aforesaid, so by him in form aforesaid acknowledged, and also l. for his costs and charges by the court here adjudged to the said A. B. by his assent, which damages in the whole amount to l. and the said C. D. in mercy, &c.

Put the costs taxed.

Judgment on demurrer on the replication.

To the end of the demurrer book. At which day, before our lord the king, at *Westminster*, come the parties aforesaid, by their attornies aforesaid, and whereupon all and singular the premises being seen, and by the court of our said lord the king now here understood, and mature deliberation being thereupon had, it appears to the said court here, that the said plea, in manner and form aforesaid by the said A. above in reply pleaded, and the matters therein contained, are sufficient in law for him the said A. to have and maintain his aforesaid action thereof against the said C. wherefore the said A. ought to recover his damages by occasion of the premises; but because it is unknown to the court of our lord the king, now here, what damages the said A. hath sustained by the means

aforesaid, the sheriffs are commanded (*as in the judgment by default.*)

Enter all the proceedings to the end of the issue, then go Judgment as on thus: At which day before our said lord the king at *Westminster*, came the parties aforesaid, by their attorneys aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereon: Therefore let a jury thereupon come before our said lord the king at *Westminster* on next after , who neither, &c. the same day is given to the said A. there, &c. At which day before our said lord the king, at *Westminster*, comes the said C. by his said attorney: and the said A. (although solemnly called) comes not; and it appearing to the court here, that the said A. hath neglected to bring the issue above joined on to be tried, according to the course and practice of the said court; therefore, according to the form of the statute in such case made and provided, it is considered, by the said court here, that the said A. take nothing by his said bill (*if by original, say writ*), but that he and his pledges to prosecute, be in mercy, &c.; and that the said A. go thereof without day, &c. And it is further considered by the said court here that the said C. recover against the said A. 1. for his costs and charges, by him about his defence in this behalf sustained, adjudged by the court here to the said C. at his request, according to the form of the statute in that case made and provided; and that the said C. have execution thereof, &c.

To the end of the issue. At which day before our said lord the king, at *Westminster*, comes the said A. B. by his said attorney; and the said C. D. although solemnly demanded in open court, to appear and produce the said record, by him above in pleading alledged, comes not, nor produces the same, but therein wholly fails and makes default, wherefore the said A. ought to recover against the said C. his damages by reason of the premises; but because it is unknown to the court of our lord the king now here what damages the said A. hath sustained by the means aforesaid, the sheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages, &c. (*as in a judgment by default.*)

Entry of a retraxit after plea pleaded, and a confession given, or relicta verificatione. (a)—At which day

Retraxit in case on confession of the action.

(a) Enter warrants of attorney, then the memorandum (if by bill), declaration and plea.

before our said lord the king, at *Westminster*, come the parties aforesaid, by their attornies aforesaid; and hereupon the said C. by his said attorney, relinquishing his said plea by him above pleaded, says, that he cannot deny the said action of the said A. nor but that he did undertake and promise, in manner and form as the said A. hath above complained against him; nor but that the said A. hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, in the said declaration mentioned, to *l.* as he has therein supposed: and hereupon the said A. prays that the said damages so acknowledged, together with his costs and charges laid out by him about his suit in this behalf, may be adjudged to him, &c. Therefore it is considered that the said A. recover against the said C. his said damages, above acknowledged to *l.* and also *5l.* for his costs and charges by the court of our said lord the king now here, adjudged to the said A. and with his assent, which said damages, costs and charges in the whole amount to *25l.* and the said C. in mercy, &c.

Entry of a judgment on an action on a note or bill referred to the master to ascertain the debt and tax the costs by a rule of court.

And the said C. D. by W. A. his attorney, comes and defends the wrong and injury when, &c. and says nothing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains therein undefended against the said C. D. for which the said A. B. ought to recover against the said C. D. his damages by occasion of the premises; and hereupon the said A. B. freely here in court remits to the said C. D. all such damages as he the said A. B. hath sustained by occasion of the premises in the last three counts of the said declaration mentioned; therefore the said C. D. is free from those damages, and thereupon the said A. B. prays judgment, and his damages by occasion of the premises in the first count of the said declaration mentioned. And because it appears to the said court of our said lord the king, before the king himself, that the said A. B. hath sustained damages by occasion of the premises, in the said first count of the said declaration mentioned, to the amount of *l.* besides his costs and charges by him about his suit in this behalf expended. Therefore it is considered, that the said A. B. recover against the said C. D. his damages by occasion of the premises, in the said first count of the said declaration mentioned, to *l.* by the said court of our said lord the king now here assessed and adjudged, to the said A. B. at his request; and also *l.* for his costs and charges, by the said court of our said lord the king now here, adjudged

to the said A. B. at his like request, which said damages, costs and charges in the whole amount to l. and the said C. D. in mercy, &c.

Judgment for want of rejoinder in debt, the plaintiff's entry was a *nil dicit*, without the entry of the plea and replication: Motion to enter the plea and replication on record. *Per Curiam*—Whenever it becomes necessary to enter all the proceedings on the record, as in the instance put of a *noli prosecute* as to part, it may be done; but generally speaking, it can answer no purpose, and is perfectly unnecessary. The master says, that in such cases it is the practice to strike out all the pleadings. And in truth, if the defendant do not rejoin, it is considered as an abandonment of the plea. Rule abs. *Petrie v. Fitzroy*, 5 Term Rep. 152.

If the defendant do not rejoin, it is considered as an abandonment of plea.

Enter the warrants of attorney on the roll, then copy to the end of the issue delivered, and go on thus: At which day, before our lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereon; therefore, as before, let a jury thereupon come before our lord the king at *Westminster*, on next after , by whom, &c. and who neither, &c. because as well, &c. The same day is given to the parties aforesaid, at the same place. At which day, before our lord the king at *Westminster*, came the parties aforesaid, by their attorneys aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereon; whereupon the said B. prays the court of our said lord the king now here, that the said A. may enter the said issue above joined between the said parties, whereupon the said A. is ordered by the court of our said lord the king now here, to enter the said issue on next after

Non pros. for not entering the issue.

(the day of the rule) in this same term, on the peril attending the neglect thereof. The same day is given to the said B. there, &c. At which day, before our said lord the king at *Westminster* comes the said B. by his said attorney, and the said A. although solemnly called, comes not, but makes default, nor hath he entered the said issue above joined in the plea aforesaid. Therefore it is considered by the court here, that the said A. take nothing by his said bill, (or writ) but that he and his pledges to prosecute be in mercy, and that the said B. do go thereof without day, &c. And it is further considered by the said court here, that the said B. recover against the said A. l. for his costs and charges by him about his

Judgment signed, &c.

defence in this behalf expended, adjudged by the said court of oursaid lord the king now here to the said B. and with his assent, according to the form of the statute in such case made and provided, and that the said B. have execution thereof, &c.

Judgment
against defen-
dant upon five
issues in debt,
and on de-
murrer to re-
plication to
sixth plea.

Enter the issue on the roll to the end of the last issue joined, then say: And as well to try the said issues above joined between the said parties, as to inquire in case a verdict be thereupon given for the said A. against the said W. what damages the said A. hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises aforesaid; whereof the parties have put themselves upon the judgment of the court, in case judgment shall be thereupon given for the said A. against the said W. Let a jury thereupon come before our lord the king at *Westminster*, on next after by whom, &c. and who neither, &c. The same day is given to the said parties there, &c. At which day, before our said lord the king at *Westminster*, come the parties aforesaid by their attorneyes aforesaid, and hereupon all and singular the premises whereof the parties have put themselves on the judgment of the court being seen by the court here, and fully understood, and mature deliberation being thereupon had, it appears to the court here, that the plea of the said A. by him above pleaded by way of reply to the said plea of the said W. by him lastly above pleaded in bar, and the matters therein contained, are sufficient in law for him the said A. to have and maintain his said action thereof against the said W. Therefore the said A. as to that plea, ought to recover his said debt, and his damages by him sustained as aforesaid, against the said W. &c. in case a verdict be given upon the said issues for the said A. against the said W. And as to the trial of those said several issues above joined, between the parties to be tried by the country, and also the inquiry of what damages the said A. hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises whereof the parties have put themselves upon the judgment of the court, in case a verdict upon the said issues be given for the said A. against the said W. the process thereof is continued between the parties aforesaid, by the jury aforesaid, being respited between them before our said lord the king at *Westminster*, until next after unless Edward Lord *Ellenborough*, his

Majesty's chief justice assigned to hold pleas in the said court of our said lord the king, before the king himself, should first come on the day of at the Guildhall of the said city, according to the form of the statute in such case made and provided for default of the said jurors, because none of them did appear; at which day, before our said lord the king at *Westminster*, comes the said A. by his said attorney, and the said chief justice aforesaid, before whom, &c. sent here his record had in these words, (to wit). Afterwards, that is to say, on the day and at the place within mentioned, before Edward Lord *Ellenborough*, chief justice of our said lord the king, before the king himself, *(to the end of the postea on the fifth issue, with the assessment of damages.)* It is therefore considered that the said A. recover against the said W. his said debt, together with his damages, costs, and charges, by the said jury in form aforesaid assessed; and also 34l. 19s. for his costs and charges by the court of our lord the king now here adjudged to the said A. of increase, and by his assent, which damages in the whole amount to 37l. and the said W. in mercy, &c.

See the postea
in that title.

To the end of the demurrer book. At which day, before our said lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid; whereupon all and singular the premises being seen and by the court of our said lord the king now here fully understood, and mature deliberation being thereupon had, it appears to the said court here, that the said plea above pleaded by the said E. in manner and form aforesaid, and the matters therein contained, are good and sufficient in law to bar the said H. from having his said action against the said E. Therefore it is considered that the said H. take nothing by his said bill, but that he and his pledges to prosecute be in mercy, &c. and that the said E. go thereof without day, &c. and it is further considered, that the said E. recover against the said H. 14l. 10s. for her costs and charges, laid out by her about her defence in this behalf adjudged to the said E. by the court of our said lord the now king here, by her assent, according to the form of the statute in such case made and provided; and that the said E. have execution thereof, &c.

Judgment for
the defendant
on a demurrer
to a plea.

To the end of the issue. At which day the jury between the parties aforesaid, in the plea aforesaid, was respited between them, before our said lord the king at *Westminster*, until next after unless the justices of our said lord the king, assigned to take the assizes in and

Judgment for
defendant on
a plea of non
assumpsit.

When the court will direct an issue.

The court will, if a warrant of attorney is given for an usurious debt, direct an issue to try the same. *Cox v. Jones, Cowp. Rep. 727.* as there can be no plea to a *scire facias* of this sort.

JUDGMENTS. (a)

ENTRY on the roll of an interlocutory judgment, award of inquiry, and final judgment thereon, where declaration is of a former term (by bill.)

As yet of the term of the *Holy Trinity*, in the 57th year of the reign of King George the third. Witness *Edward Lord Ellenborough*, 1817.

Warrant of attorney for plaintiff.

London, (ss) A. B. (the plaintiff) puts in his place, J. J. his attorney, against C. D. (the defendant,) in a plea of trespass on the case.

For defendant.

London, (ss) The said C. D. in his own person, at the suit of the said A. B. in the plea aforesaid.

Memorandum.

London, (ss) Be it remembered, that in *Easter* term last past, before our lord the king at *Westminster*, came A. B. by J. K. his attorney, and brought into the court of our said lord the king before the king himself, then there, his certain bill against C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words; to wit, *London*, (ss) A. B. complains of C. D. (*here insert the whole declaration verbatim to the word suit, &c. then in a new line add the judgment as follows.*)

Imparance.

And now at this day, (that is to say,) on *Friday* next after the morrow of the *Holy Trinity*, in this same term, until which day the said C. D. had leave to imparle to the said bill, and then to answer the same, &c.

Judgment ~~at which day,~~ before our said lord the king at *Westminster*, comes as well the said A. B. by his said attorney, as the said C. D. in his own person, and the said C. D. defends the wrong and injury when, &c. and says nothing in bar or preclusion of the said action of the said A. B.

(a) On postea and inquiries, Mr. *Edge*, on being paid enters on the roll the judgments, which he draws himself,

by which the said A. B. remains therein undefended against the said C. D. for which the said A. B. ought to recover against the said C. D. his damages by occasion of the premises; but because it is unknown to the court of our lord the king now here, what damages the said A. B. hath sustained, by reason of the premises aforesaid; it is therefore commanded to the sheriffs, that by the oath of twelve good and lawful men of their bailiwick they diligently inquire what damages the said A. B. hath sustained, as well by the means aforesaid, as for his costs and charges by him about his suit in this behalf expended; and that they send the inquisition which they shall thereupon take to our lord the king at *Westminster*, on next after under their seal, and the seals of those by whose oath they shall take the said inquisition, together with the writ of our said lord the king, to them thereupon directed; the same day is given to the said A. B. at the same place, (a). At which day before our said lord the king at *Westminster*, came the said *John*, by his said attorney, and the sheriffs, to wit,

If in Middlesex, say sheriff.

Sheriff's inquisition, state it exact.

and sheriffs of the said city, returned a certain inquisition indented, taken before them at in the same city, on the day of in the 57th year of the reign of our sovereign lord the now king, by the oath of twelve honest and lawful men of their bailiwick; by which it was found, that the said A. B. hath sustained damages, by occasion of the premises, over and above his costs and charges, to l. and for those costs and charges to twenty-nine shillings and four pence. Therefore it is considered that the said A. B. recover against the said C. D. his damages aforesaid, by the said inquisition above found; and also £. for his said costs and charges by the court of our said lord the king now here, adjudged of increase, to the said A. B. and with his assent; which said damages, costs and charges, in the whole amount to l. and the said C. D. in mercy, &c,

If the declaration be of one term, and the interlocutory

If declaration be of one term, and the judgment of another term.

(a) It is not necessary for the practiser to go on further with his entry than this, as the clerk of the treasury will on leaving the inquisition with him complete the judgment.

judgment of another, there must be an imparlance entered, so as to continue the pleadings over from the delivery of the declaration, to the signing of the judgment.

But if the declaration and the judgment be of the same term, then an imparlance is not necessary, and the entry will be thus:

As yet of the term of the Holy Trinity, 57 Geo. 3. Witness Edward Lord Ellenborough, 1817.

Middlesex, to wit. A. B. puts in his place J. K. his attorney, against C. D. in a plea of trespass and assault.

Middlesex (ss) The said C. D. puts in his place J. B. his attorney, at the suit of the said A. B. in the plea aforesaid.

The first day
of term.

Middlesex, } Be it remembered, that on *Friday*
to wit. } next after the morrow of the Holy
Trinity, in this same term before our lord the king, at
Westminster, comes A. B. by J. K. his attorney, and
brings into the court of our said lord the king, before the
king himself now here, his certain bill against C. D.
being in the custody of the marshal of the Marshalsea
of our lord the now king before the king himself, of a plea
of trespass and assault (*as the action is*) and there are
pledges for the prosecution, to wit, *John Doe* and
Richard Roe; which said bill follows in these words, to
wit, *Middlesex*, to wit, (*here enter the declaration verba-*
tim to suit, &c. then on a new line add the judgment thus):

Judgment.

And the said C. D. by J. B. his attorney, comes and
defends the force and injury, when, &c. and says nothing
in bar or preclusion of the said action of the said A. B.
whereby the said A. B. remains therein undefended against
the said C. D. for which the said A. B. ought to recover
against the said C. D. his damages by occasion of
the premises: but because it is unknown to the court of
our lord the king, now here, what damages the said A. B.
hath sustained by reason of the premises aforesaid; it is
therefore commanded to the sheriff, that by the oath of
twelve good and lawful men of his bailiwick, he dili-
gently inquire, &c. (*as in the former one.*)

Entry of a
judgment on
a warrant of
attorney on a
mutuatus.

(a) *London* (ss.) A. B. puts in his place E. I. his attorney
against C. D. in a plea of debt.

(a) Put the term at the top, as in the first precedent
"as yet of," &c.

London, (ss) The said C. D. puts in his place T.G. his attorney, at the suit of the said A. B. in the plea aforesaid.

London, (ss) Be it remembered, that on *Friday* next after the morrow of the Holy *Trinity*, in this same term before our lord the king at *Westminster*, comes A. B. by I. K. his attorney, and brings into the said court of our said lord the king, before the king himself, now here, his certain bill against C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of debt; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit, *London, to* wit, A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said A. 40*l.* of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas the said C. on the day of in the year of The date of our Lord '18 at *London* aforesaid, to wit, in the parish warrant of of *St. Mary le Bow*, in the ward of Cheap, borrowed of the said A. B. the said l. to be paid to the said A. when he the said C. should be thereto afterwards requested; yet the said C. (although often requested, &c.) hath not yet paid the said l. above demanded, or any part thereof, to the said A. but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the said A. his damage of 10*l.* and therefore he brings his suit, &c. (a)

And the said C. by T. G. his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said A. by which the said A. remains therein undefended against the said C. Therefore it is considered, that the said A. recover against the said C. his said debt, and also 80*s.* for his damages which he hath sustained, as well by occasion of the detaining the said debt, as for his costs and charges, by him about his suit in this behalf expended, by the court of our lord the king now here adjudged to the said A. by his assent, and the said C. in mercy, &c. Judgment by nil dicit.

(a) If the warrant be to enter up the judgment on bond, the declaration in that case must be upon the bond, for which see title *Declaration*; then follows the judgment.

If it is upon an old warrant of attorney, the matter will tax the costs.

Judgment by non sum informatus.

And the said C. by J. K. his attorney, comes and defends the wrong and injury, when, &c. and the said A. prays that the said C. may answer to his said declaration, whereupon the said attorney of the said C. says, that he is not informed by the said C. of any answer to be given for the said C. in the premises, nor does he say any thing in bar or preclusion of the said action of the said A. by which the said A. remains therein undefended against the said C. Therefore it is considered that the said A. recover against the said C. his said debt, and also (as in the other).

Judgment by cognovit actionem in case, where the defendant acknowledges the debt.

And the said C. D. by J. T. his attorney, comes and defends the wrong and injury, when, &c. and says, That he cannot deny the said action of the said A. B. nor but that he the said C. D. did undertake and promise, in manner and form as the said A. B. hath above thereof complained against him; nor but that the said A. B. hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, to l. as he the said A. B. hath above in his said declaration supposed: and hereupon the said A. B. prays that the said damages so acknowledged, together with his expences and costs, laid out by him about his suit in this behalf, may be adjudged to him, &c. Therefore it is considered, That the said A. B. recover against the said C. D. his damages aforesaid, so by him in form aforesaid acknowledged, and also l. for his costs and charges by the court here adjudged to the said A. B. by his assent, which damages in the whole amount to l. and the said C. D. in mercy, &c.

Put the costs taxed.

Judgment on demurrer on the replication.

To the end of the demurrer book. At which day, before our lord the king, at *Westminster*, come the parties aforesaid, by their attorneys aforesaid, and whereupon all and singular the premises being seen, and by the court of our said lord the king now here understood, and mature deliberation being thereupon had, it appears to the said court here, that the said plea, in manner and form aforesaid by the said A. above in reply pleaded, and the matters therein contained, are sufficient in law for him the said A. to have and maintain his aforesaid action thereof against the said C. wherefore the said A. ought to recover his damages by occasion of the premises; but because it is unknown to the court of our lord the king, now here, what damages the said A. hath sustained by the means

aforesaid, the sheriffs are commanded (*as in the judgment by default.*)

Enter all the proceedings to the end of the issue, then go on thus: At which day before our said lord the king at *Westminster*, came the parties aforesaid, by their attorneys aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereon: Therefore let a jury thereupon come before our said lord the king at *Westminster* on next after , who neither, &c. the same day is given to the said A. there, &c. At which day before our said lord the king, at *Westminster*, comes the said C. by his said attorney: and the said A. (although solemnly called) comes not; and it appearing to the court here, that the said A. hath neglected to bring the issue above joined on to be tried, according to the course and practice of the said court; therefore, according to the form of the statute in such case made and provided, It is considered, by the said court here, that the said A. take nothing by his said bill (*if by original, say writ*), but that he and his pledges to prosecute, be in mercy, &c.; and that the said A. go thereof without day, &c. And it is further considered by the said court here that the said C. recover against the said A. 1. for his costs and charges, by him about his defence in this behalf sustained, adjudged by the court here to the said C. at his request, according to the form of the statute in that case made and provided; and that the said C. have execution thereof, &c.

Judgment as in the case of a nonsuit.

To the end of the issue. At which day before our said lord the king, at *Westminster*, comes the said A. B. by his said attorney; and the said C. D. although solemnly demanded in open court, to appear and produce the said record, by him above in pleading alledged, comes not, nor produces the same, but therein wholly fails and makes default, wherefore the said A. ought to recover against the said C. his damages by reason of the premises; but because it is unknown to the court of our lord the king now here what damages the said A. hath sustained by the means aforesaid, the sheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages, &c. (*as in a judgment by default.*)

Judgment on a replication of null tiel record on a rule to produce in case.

Entry of a retraxit after plea pleaded, and a confession given, or relicta verificatione. (a)—At which day

Retraxit in case on confession of the action.

(a) Enter warrants of attorney, then the memorandum (if by bill), declaration and plea.

before our said lord the king, at *Westminster*, come the parties aforesaid, by their attornies aforesaid; and hereupon the said C. by his said attorney, relinquishing his said plea by him above pleaded, says, that he cannot deny the said action of the said A. nor but that he did undertake and promise, in manner and form as the said A. hath above complained against him; nor but that the said A. hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, in the said declaration mentioned, to l. as he has therein supposed: and hereupon the said A. prays that the said damages so acknowledged, together with his costs and charges laid out by him about his suit in this behalf, may be adjudged to him, &c. Therefore it is considered that the said A. recover against the said C. his said damages, above acknowledged to l. and also 5l. for his costs and charges by the court of our said lord the king now here, adjudged to the said A. and with his assent, which said damages, costs and charges in the whole amount to 25l. and the said C. in mercy, &c.

Entry of a judgment on an action on a note or bill referred to the master to ascertain the debt and tax the costs by a rule of court.

And the said C. D. by W. A. his attorney, comes and defends the wrong and injury when, &c. and says nothing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains therein undefended against the said C. D. for which the said A. B. ought to recover against the said C. D. his damages by occasion of the premises; and hereupon the said A. B. freely here in court remits to the said C. D. all such damages as he the said A. B. hath sustained by occasion of the premises in the last three counts of the said declaration mentioned; therefore the said C. D. is free from those damages, and thereupon the said A. B. prays judgment, and his damages by occasion of the premises in the first count of the said declaration mentioned. And because it appears to the said court of our said lord the king, before the king himself, that the said A. B. hath sustained damages by occasion of the premises, in the said first count of the said declaration mentioned, to the amount of l. besides his costs and charges by him about his suit in this behalf expended. Therefore it is considered, that the said A. B. recover against the said C. D. his damages by occasion of the premises, in the said first count of the said declaration mentioned, to l. by the said court of our said lord the king now here assessed and adjudged, to the said A. B. at his request; and also l. for his costs and charges, by the said court of our said lord the king now here, adjudged

to the said A. B. at his like request, which said damages, costs and charges in the whole amount to l. and the said C. D. in mercy, &c.

Judgment for want of rejoinder in debt, the plaintiff's entry was a *nil dicit*, without the entry of the plea and replication: Motion to enter the plea and replication on record. *Per Curiam*—Whenever it becomes necessary to enter all the proceedings on the record, as in the instance put of a *noli prosequi* as to part, it may be done; but generally speaking, it can answer no purpose, and is perfectly unnecessary. The master says, that in such cases it is the practice to strike out all the pleadings. And in truth, if the defendant do not rejoin, it is considered as an abandonment of the plea. Rule abs. *Petrie v. Fitzroy*, 5 Term Rep. 152.

If the defendant do not rejoin, it is considered as an abandonment of plea.

Enter the warrants of attorney on the roll, then copy to the end of the issue delivered, and go on thus: At which day, before our lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereon; therefore, as before, let a jury thereupon come before our lord the king at *Westminster*, on next after , by whom, &c. and who neither, &c. because as well, &c. The same day is given to the parties aforesaid, at the same place. At which day, before our lord the king at *Westminster*, came the parties aforesaid, by their attorneys aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereon; whereupon the said B. prays the court of our said lord the king now here, that the said A. may enter the said issue above joined between the said parties, whereupon the said A. is ordered by the court of our said lord the king now here, to enter the said issue on next after

Non pros. for not entering the issue.

(the day of the rule) in this same term, on the peril attending the neglect thereof. The same day is given to the said B. there, &c. At which day, before our said lord the king at *Westminster* comes the said B. by his said attorney, and the said A. although solemnly called, comes not, but makes default, nor hath he entered the said issue above joined in the plea aforesaid. Therefore it is considered by the court here, that the said A. take nothing by his said bill, (or writ) but that he and his pledges to prosecute be in mercy, and that the said B. do go thereof without day, &c. And it is further considered by the said court here, that the said B. recover against the said A. l. for his costs and charges by him about his

Judgment signed, &c.

defence in this behalf expended, adjudged by the said court of oursaid lord the king now here to the said B. and with his assent, according to the form of the statute in such case made and provided, and that the said B. have execution thereof, &c.

Judgment
against defen-
dant upon five
issues in debt,
and on de-
murrer to re-
plication to
sixth plea.

Enter the issue on the roll to the end of the last issue joined, then say: And as well to try the said issues above joined between the said parties, as to inquire in case a verdict be thereupon given for the said A. against the said W. what damages the said A. hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises aforesaid; whereof the parties have put themselves upon the judgment of the court, in case judgment shall be thereupon given for the said A. against the said W. Let a jury thereupon come before our lord the king at *Westminster*, on next after by whom, &c. and who neither, &c. The same day is given to the said parties there, &c. At which day, before our said lord the king at *Westminster*, come the parties aforesaid by their attornies aforesaid, and hereupon all and singular the premises whereof the parties have put themselves on the judgment of the court being seen by the court here, and fully understood, and mature deliberation being thereupon had, it appears to the court here, that the plea of the said A. by him above pleaded by way of reply to the said plea of the said W. by him lastly above pleaded in bar, and the matters therein contained, are sufficient in law for him the said A. to have and maintain his said action thereof against the said W. Therefore the said A. as to that plea, ought to recover his said debt, and his damages by him sustained as aforesaid, against the said W. &c. in case a verdict be given upon the said issues for the said A. against the said W. And as to the trial of those said several issues above joined, between the parties to be tried by the country, and also the inquiry of what damages the said A. hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises whereof the parties have put themselves upon the judgment of the court, in case a verdict upon the said issues be given for the said A. against the said W. the process thereof is continued between the parties aforesaid, by the jury aforesaid, being respited between them before our said lord the king at *Westminster*, until next after unless Edward Lord *Ellenborough*, his

Majesty's chief justice assigned to hold pleas in the said court of our said lord the king, before the king himself, should first come on the day of at the Guildhall of the said city, according to the form of the statute in such case made and provided for default of the said jurors, because none of them did appear; at which day, before our said lord the king at *Westminster*, comes the said A. by his said attorney, and the said chief justice aforesaid, before whom, &c. sent here his record had in these words, (to wit). Afterwards, that is to say, on the day and at the place within mentioned, before Edward Lord *Ellenborough*, chief justice of our said lord the king, before the king himself, *(to the end of the postea on the fifth issue, with the assessment of damages.)* It is therefore considered that the said A. recover against the said W. his said debt, together with his damages, costs, and charges, by the said jury in form aforesaid assessed; and also 34l. 19s. for his costs and charges by the court of our lord the king now here adjudged to the said A. of increase, and by his assent, which damages in the whole amount to 37l. and the said W. in mercy, &c.

See the postea in that title.

To the end of the demurrer book. At which day, before our said lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid; whereupon all and singular the premises being seen and by the court of our said lord the king now here fully understood, and mature deliberation being thereupon had, it appears to the said court here, that the said plea above pleaded by the said E. in manner and form aforesaid, and the matters therein contained, are good and sufficient in law to bar the said H. from having his said action against the said E. Therefore it is considered that the said H. take nothing by his said bill, but that he and his pledges to prosecute be in mercy, &c. and that the said E. go thereof without day, &c. and it is further considered, that the said E. recover against the said H. 14l. 10s. for her costs and charges, laid out by her about her defence in this behalf adjudged to the said E. by the court of our said lord the now king here, by her assent, according to the form of the statute in such case made and provided; and that the said E. have execution thereof, &c.

Judgment for the defendant on a demurrer to a plea.

To the end of the issue. At which day the jury between the parties aforesaid, in the plea aforesaid, was respited between them, before our said lord the king at *Westminster*, until next after unless the justices of our said lord the king, assigned to take the assizes in and

Judgment for defendant on a plea of non assumpsit.

for the county aforesaid, by form of the statute, &c. should first come on the day of at H. in the county aforesaid. And now here, at this day, comes the said I. S. by his attorney aforesaid, and the said justices of assize, before whom, &c. sent here their record in these words, to wit (afterwards, to wit, to the end of the *postea*.) Therefore it is considered, that the said I. M. take nothing by his said writ, but that he and his pledges to prosecute be in mercy, &c. and that the said I. S. go thereof without day, &c. It is also considered that the said I. S. recover against the said I. M. 17l. for his costs and charges, laid out by him in and about his defence, in this behalf adjudged by the court of our said lord the king now here, by his assent, according to the form of the statute in such case made and provided; and that the said I. S. have execution thereof, &c.

Against an
administrator
in debt by de-
fault.

And the said C. by J. K. her attorney, comes and defends the wrong and injury, when, &c. and says, that she cannot deny the said action of the said A. nor but that the writing obligatory is the deed of the said F. nor but that she the said C. administratrix as aforesaid, detains from the said A. the said 100l. above demanded in manner and form as the said A. hath above complained against her. Therefore it is considered, that the said A. recover against the said C. administratrix as aforesaid, his said debt, and also 6l. 10s. for his damages, which he hath sustained, as well by occasion of the detaining thereof, as for his costs and charges by him about his suit in this behalf expended, adjudged to the said A. and with his assent, to be levied of the goods and chattels which were of the said F. at the time of his death in her hands to be administered, if she hath so much thereof in her hands to be administered, and if she hath not so much thereof in her hands to be administered, then the said 6l. 10s. being the damages, costs and charges, aforesaid, to be levied of the proper goods and chattels of the said C. And the said C. in mercy, &c.

The like by
confession in
assumpsit.

And the said C. by J. K. her attorney, comes and defends the wrong and injury, when, &c. and says, that she cannot deny the said action of the said A. nor but that the said F. in his lifetime did undertake and promise, in manner and form as the said A. hath above thereof complained against him, nor but that the said A. hath sustained damages by reason of the not performing the said promises and undertakings in the said declaration mentioned, to 25l. as the said A. hath above supposed: and

upon this the said A. prays judgment, and his damages so acknowledged, together with his costs and charges by him about his suit in this behalf expended, to be adjudged to him, &c. Therefore it is considered, that the said A. recover against the said C. administratrix as aforesaid, his said damages so above acknowledged, and also 6l. for his costs and charges by the court of our said lord the king now here adjudged to the said A. and with his assent, which said damages, costs, and charges, in the whole, amount to 31l. to be levied of the goods and chattels which were of the said F. at the time of his death, in her hands to be administered; if she hath so much thereof in her hands to be administered, and if she hath not so much in her hands to be administered, then 6l. parcel of the damages aforesaid, being for the costs and charges aforesaid, to be levied of the proper goods and chattels of the said C. and the said C. in mercy, &c.

Enter the declaration and plea of *plene administravit*; and hereupon the said A. inasmuch as the said C. does not deny the said action of the said A. nor but that the said E. in his lifetime, did undertake and promise, in manner and form as the said A. hath above in that behalf alledged; and inasmuch as the said A. cannot deny but that the said C. hath not any goods or chattels which were of the said E. at the time of his death in her hands to be administered, in manner and form as the said C. hath above in her said plea in that behalf alledged, prays judgment, and his damages, on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, to be levied of the goods and chattels which were of the said E. at the time of his death, and which, after final judgment in this respect, shall come to the hands of the said C. to be administered. Therefore it is considered, that the said A. recover against the said C. his damages by him sustained by reason of the premises aforesaid to be levied in form aforesaid; but because it is unknown to the court of our lord the king now here, what damages the said A. hath sustained by reason of the premises aforesaid; therefore the sheriff is commanded, that by the oath of twelve honest and lawful men of his bailiwick, he diligently inquire what damages the said A. hath sustained by reason of the premises aforesaid; and that he send the inquisition which he shall thereupon take to our lord the king at Westminster, on next after under his seal, and the seals of those by

Judgment of
assets in
futuro upon a
plea of plene
administravit
in assumpsit.

6 Term Rep. 1.

whose oath he shall take the said inquisition, together with the writ of our lord the king to him thereupon directed. The same day is given to the parties aforesaid at the same place. At which day, before our lord the king at Westminster, came the said A. by his said attorney; and the sheriff, to wit, W. K. and L. M. esquires, sheriff of the said county, returned a certain inquisition by him taken at, &c. on the day of in the 52d year of the reign of our lord the now king, by the oath of twelve good and lawful men of his county, by which it is found that the said A. hath sustained damages by reason of the premises aforesaid to 50l. Therefore it is considered that the said A. recover against the said C. the said 50l. for his damages aforesaid by the inquisition aforesaid above found, to be levied of the goods and chattels which were of the said E. at the time of his death, and which shall hereafter come to the hands of the said C. to be administered. And the said C. in mercy, &c.

There are no costs, Ball et al. v. De Champs et al. T. 24 Geo. 3.

Although there are no costs *de incremento* in this case; *quare*, if the sheriff does not return costs on his inquisition? If so, they should be added as in other judgments in case.

Judgment of assets in futuro upon a plea of plene administravit in debt.

And hereupon the said A. B. inasmuch as the said C. D. doth not deny the said action of the said A. B. nor but that the said writing obligatory is the deed of the said E. F. nor but that the said C. D. detains from the said A. B. the said sum of — 1. above demanded in manner and form as the said A. B. hath above in her behalf alledged; and inasmuch as the said A. B. cannot deny but that the said C. D. hath not any goods or chattels which were of the said E. F. at the time of his death, in his hands to be administered, in manner and form as the said C. D. hath above in his said plea in that behalf alledged, the said A. B. prays judgment, and her said debt, together with her damages by her sustained, on occasion of detaining thereof, to be adjudged to her; to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which hereafter shall come to the hands of the said C. D. to be administered. Therefore it is considered, that the said A. B. recover against the said C. D. her said debt and also — 1. for her damages by her sustained on occasion of the detaining thereof, by the court of our said lord the king now here adjudged to the said A. B. and with her assent, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which hereafter shall

See 6 Term Rep. 1.

come to the hands of the said C. D. to be administered ; and the said C. D. in mercy, &c.

This judgment is first signed on a 4d. stamp paper, How to sign and notice must be given in the usual way to execute the judgment. inquiry, and the plaintiff's debt must be proved before the sheriffs ; but if the action is in debt, sign it on a 10s. stamp paper.

In an action against an insolvent debtor, or fugitive, Insolvent debtor. whose future effects remain liable to the payment of his debts, the plaintiff may take judgment for his demand, to be levied of those effects. 1 Term Rep. 80, (a)

As yet of the Term of, &c.

Middlesex, to wit. C. D. puts in his place G. H. his attorney, at the suit of A. B. in a plea of trespass.

Judgment of non pros. for not declaring on common process by bill.

Middlesex, to wit. C. D. according to the form of the statute in such case made and provided, was served with a copy of a precept (b) called a bill of *Middlesex*, issued out of the court of our lord the king, before the king himself, returnable on next after in term now last past, to answer A. B. in a plea of trespass ; and the said C. D. at that day appeared by J. K. his attorney, according to the form of the statute in such case made and provided : and the said A. B. hath not declared in the said court of our said lord the king, before the king himself at *Westminster*, aforesaid, by his bill, or declaration, in any personal action, or ejectment, against the said C. D. before the end of this present term, being the next term after the appearance of him the said C. D. at the suit of the said A. B. Therefore it is considered, that the said A. B. take nothing by his said precept, (or writ) but that he be in mercy, &c. And it is further consider-

(a) In this case the award of the judgment is to recover the damages and costs to be levied, not on the person of the defendant, but on his lands, goods and chattels, according to the form of the statute in such case made and provided.

(b) If a latitat, say, a certain writ of latitat (or *alias capias*) issued, &c. directed to the sheriff of and returnable, &c. to answer A. B. in a plea of trespass, and also to a bill, &c. (the action) and the said C. D. at the same day appeared, &c.

ed by his majesty's court here that the said C. D. do recover against the said A. B. —l. for his costs and charges by him laid out about his defence in this behalf, by the court of our said lord the king now here adjudged to the said C. D. and with his assent, according to the form of the statute in such case made and provided, and that the said C. D. have execution thereof, &c.

If *latitat*, &c.

I have altered this for a *latitat* or *alias capias*, or *pluries capias*, only state the name of the writ, and the *venue* is to be in the margin of the roll, and judgment paper as directed in the writ. There is only the defendant's warrant of attorney to be entered in this case.

If by original.

If the nonpros be by original say, was served with a copy of a certain writ of our lord the king, called a special *capias ad respondendum*, issued out of the court of our said lord the king, before the king himself, directed to the sheriff of and returnable on wheresoever our said lord the king should then be in *England*, to answer A. B. in a certain plea of trespass on the case upon promises to the damage of the said A. B. of 100*l.* and the said C. D. at the same day appeared, &c.

SCIRE FACIAS TO REVIVE JUDGMENT.

Of reviving a judgment after a year and day.

ALL writs of execution must be sued out within a year and a day after final judgment signed; otherwise the court concludes, *prima facie*, that the judgment is satisfied and extinct; yet however it will grant a *scire facias* in pursuance of the statute of *Westm.* 13 Ed. 1. c. 45. for the defendant to shew cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege, in order to shew why process of execution should not be issued; or the plaintiff may still bring an action of debt founded on this dormant judgment, which was the only method of revival allowed by the common law. *Co. Lit.* 290. 2 *Inst.* 469. But if once an execution is sued within the year, and it be not executed but returned by the sheriff, it may be continued on the roll from term to term, and there needs no *sci. fa.* 2 *Inst.* 471. 2 *Lill. Pract. Reg.* 608.

But now see stat. 43 Geo. 3. c. 46. sect. 5. as to costs.

A *sci. fa.* to revive on a judgment se-

A *scire facias* to revive a judgment entered on a bond securing an annuity granted before the 17 Geo. 3. c. 26. is an action within that statute; and therefore a memorial

of the annuity must be inrolled before brought, and execution on a *sci. fa.* for want of it, was set aside. *Fenner v. Evans*, 2 Term Rep. 27. cured to pay an annuity is an action.

A *scire facias* is a judicial, not an original writ, but is framed out of the record; and is in the nature of an action; for a release of actions or executions, discharges it. *Co. Lit.* 290. b. Judicial writ.

It is a judicial writ, in the nature of an original. Judicial, inasmuch as it is founded on a judgment, or other matter of record; and in the nature of an original, since similar proceedings may be had thereon, as in common actions: and it hath been held in a variety of cases, that it is an action. *Fenner v. Evans*, 1 Term Rep. 267. 2 Term Rep. 45. It is in nature of an original and in a variety of cases an action.

And there must be a new warrant, to authorise the appearance of the plaintiff's attorney. 2 *Ld. Ray.* 1048. 1252. 2 *B. & P.* 357. (b). 1 *Salk.* 89. But there is no occasion for a rule to change the attorney. *Say.* 218. A new warrant.

It must be sued out of the same court where the judgment was given, if the record remains there, or if it has been removed out of the court where the record is. *Com. Dig. tit. Pleader*, 3 L. 3. When it must be sued out of same court.

A bond conditioned for the payment of a certain sum by instalments, is within the stat. 8 & 9 W. 3. c. 11. s. 8. and after judgment obtained upon default of payment of one of the instalments, if a subsequent instalment be in arrear, the plaintiff cannot sue out execution for it, though within a year after such judgment, without first suing out a *sci. fa.* to recover it. *Willoughby v. Swinton*, 6 *East*, 550. 2 *Burr.* 820. *Collins v. Collins*. 8 Term Rep. 120. *Walcot v. Goulding*. A bond by instalments, judgment signed on default of the payment of one must have *sci. fa.* for next.

An execution had after a year and a day without *sci. fa.* is not void, but voidable. 3 *Lev.* 140. *Salk.* 273, pl. 4. If sued out after the time it is not void but voidable.

If there has been no *cá. sa.*, *fi. fa.*, *elegit*, or *hab. fac. possessionem* sued out within the year and day, then in order to revive the judgment, and take out execution you must sue out a *scire facias* into the county where the original action was brought, the court supposing the defendant to reside in the same county. *Salk.* 251, 600. *Comb.* 250. N. on R. E. 5 *Geo.* 2. Sci. fa. must be sued out in the county where the original action was.

This *sci. fa.* was intended to prevent a surprise upon the defendant after the year and day elapsed; but where he affects the delay, by bringing a writ of error, though When no sci. fa. necessary.

above a year and day, yet execution may issue without a *sci. fa. Cro. Jac.* 364. So if he be nonsuited, or discontinues in error, though the year was expired before error brought. *Ibid.*

If there be a stay of execution for a year.

If the plaintiff has judgment with a *cesset executio*, or stay of execution for a year, he may after the year, take out execution without a *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff ought not to be turned to his prejudice. But if the plaintiff do not take out execution within a year after the *cesset executio* is determined, a *sci. fa.* must be sued out, *Mod. Cas.* 288. 1 *Salk.* 322.

If an injunction.

An execution was taken out without a *sci. fa.* where the defendant had made delays by bills in chancery for injunctions, and by obtaining time for payment, which the court held regular, and discharged the rule obtained for setting the proceedings aside with costs. - 2 *Burr.* 660. *Mitchel v. Cue*, 1 *Str.* 101. *contra.*

Computation of the year.

The year is to be computed from the day of signing judgment, not by the number of terms. *Mod. Cas.* 288.

If execution not returned, or not filed, continuances cannot be entered.

If execution is *not returnable by the sheriff*, or not filed, continuances on it cannot be entered on the roll; if they are, and a *ca. sa.* is issued after the year, without *sci. fa.* defendant shall be discharged out of custody, and plaintiff pay costs. Vide 2 *Wils.* 82. *Barnes*, 213.

If error be brought.

If error be brought, though the party be hung up never so many years, yet there may be execution sued out immediately upon affirmance without a *sci. fa.* 2 *Inst.* 471. 5 *Co.* 78. 6 *Mod.* 288. 1 *Salk.* 322. *Str.* 301. *Winter v. Lightbound.*

If Plaintiff or Defendant die after final Judgment, and before Execution.

If plaintiff dies.

It is held that in no case where the parties to the judgment are changed, ought execution to be sued by any other judgment without a *scire facias*; therefore, if the plaintiff dies before execution awarded, the execution cannot be sued out in his name before *sci. fa.* 2 *Ld. Ray.* 768. *Regina v. Ford.* But if execution is executed before the death of plaintiff, it is good, for the plaintiff's death does not alter the execution.

Also upon the death of the defendant, after final judgment recovered against him, no execution can issue against his executors or administrators, without a *scire facias*, to shew cause why the plaintiff should not have execution against the goods, &c. of the testator. *Lutw.* 1273. To this the executors and administrators may appear and plead such matter as they have to allege, why execution should not issue: if not, judgment will be signed by default, and execution issue thereon against the goods, &c. of their testator in their hands. But if the defendant die in the vacation, and the judgment is not above a year and a day past, the plaintiff may sign judgment and take out execution, provided he teste it *before the death of the defendant.* 6 *Term Rep.* 368. But if he teste it *after*, there must be a *sci. fa.* *Ibid.*

If defendant die after final judgment.

If he die in vacation.

If one recover against a *feme sole*, and she is married within the year and day, a *sci. fa.* must go against the husband. *Wood's Inst.* 670. *Lut.* 1273.

If recovery against a *feme sole*.

The husband cannot have execution for the costs on a plea of coverture found for the defendant without a *sci. fa.* it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process without a *sci. fa.* *Dougl.* 637. *Wortley v. Rayner.*

The husband cannot have execution with a *sci. fa.*

It is necessary in case the plaintiff becomes nonsuit.

Necessary on a nonsuit.

If an executor or administrator obtains judgment, and dies before execution, an administrator *de bonis non*, &c. shall have a *sci. fa.* upon such judgment. *Stat.* 17 *Car.* 2. c. 8. *Jon.* 214. 1 *Rol.* 890. *Cro. Car.* 167.

If executor die.

If a judgment be against two, the *sci. fa.* must be against both. 2 *Salk.* 598. *Carth.* 105. *S. C.* (a)

If against two.

If a writ of execution be once sued out, returned, filed, and entered on the roll, it may be continued until you sue out and execute a new one, and be as effectual as if new writs were issued out every term. *Str.* 100. *Aires v. Hardress.*

If execution once sued out, need not sue out *scire facias*.

When a sci. fa. may be sued out without Motion.

The writ of *scire facias* may be sued out of course at any time within seven years from the date of the judgment without application to the court.

Within seven years.

(a) In setting out the judgment, if there be a material variance, it will be fatal, on a *nul tiel* record.

If above seven and under ten years. But if it be above seven years old, and under ten, a side bar rule from the clerk of the rules may be had on producing the judgment paper, for which pay 7s. and it need no service on the defendant. 2 Salk. 598. *Hardisty v. Barny*.

If ten and under fifteen. If the judgment be above ten years old and under fifteen, there must be a motion made for it by counsel, supported by an affidavit that the judgment is unsatisfied, and the defendant alive, which is absolute in the first instance.

If more than fifteen. And if the judgment be more than fifteen years old, then there must be a motion in court by counsel; fee 10s. 6d. for a rule to shew cause on a similar affidavit, pay for rule 7s. 6d. serve a copy on defendant, and after make affidavit of the service, and give counsel a brief to make the rule absolute; fee 1l. 1s. which being done, serve a copy on defendant, and sue out the *scire facias*.

Pay rule 7s. 6d. If the plaintiff be dead. If the plaintiff be dead, and the judgment be above seven, ten, or fifteen years, the executor or administrator may apply in the same manner.

When a new sci. fa. after a revival. If after the judgment has been revived by *scire facias*, the plaintiff do not take out execution within a year, or the defendant die before execution issued, the plaintiff must sue out a new *scire facias*, but may have it without motion, for the judgment was revived before. 2 Salk. 598. *Hardisty v. Barny*.

In debt on bond by instalments. In debt on bond payable by instalments, where the proceedings are staid on payment of one or more of them, and judgment is entered as a security for the remainder, with a stay of execution till they become due; and in such case there seems to be no necessity for a *scire facias* if execution be taken out within a year after each default. 2 Str. 957. *Darby v. Wilkins*. 2 Bl. Rep. 706. *Masfen v. Touchet*.

When an alias requisite. If upon a *scire facias*, the sheriff returns *scire feci*, and defendant makes default in appearance, there shall be judgment against him. But in all cases when the sheriff returns *nihil*, another *scire facias* shall be awarded. 2 Mod. 227. 2 Inst. 472. And if he does not appear, there shall be judgment against him. Dy. 168.

Scire facias to be left four days before return, if notice is given. It is ordered, that every writ of *scire facias*, (of which notice shall be given to the defendant,) shall be delivered to, or left in the office of the sheriff to whom directed, four days before the return of such writ, exclusive of the day on which such writ is returnable: and that every first

writ of *scire facias* on which a *nihil* shall be returned, shall be delivered to, or left in the office of the sheriff, some time before the return of such writ; and that every writ of *alias scire facias*, shall be delivered to, or left in the office of the sheriff, four days exclusive before the return of such writ, and every sheriff shall indorse or write on such writ, the day of the month on which the same is delivered to him, or left in his office. R. E. 5 Geo. 2.

If a nihil, some time before return.

Alias four days.

Sheriff to indorse it.

The rule is, that the *alias sci. fa.* shall lie in the office the last four days before the return; and the reason is, that the sheriff may (if possible) serve it. *Per Cur.* *Forty v. Hermer*, 4 Term Rep. 583.

How long an alias to lie in the office.

It is ordered, that upon issuing any writ of *scire facias*, upon any suit here depending, no writ of *alias scire facias* shall thereupon issue, until the first writ of *scire facias* be returnable. If sued contrary to this rule, such *alias* shall be void. R. T. 8 W. 3.

No alias to issue until the first writ be returnable.

If there be two *sci. fa.*'s, there must be fifteen days between the *teste* of the first, and return of the second, without any regard to the number of days between the *teste* and return of each. *Str.* 1139. It cannot be tested on a Sunday. *Dy.* 168. *Mod. Cas. Law and Equity*, 227. 305. *Salk.* 599. And every writ of *alias* shall bear *teste* the day of the return of the first. *Salk.* 599. 6 *Mod.* 86.

Each to have seven days between *teste* and return by bill.

The court in *Easter* term, 1792, held that four days exclusive are sufficient between the *teste* and return of the *sci. fa.* where one *sci. fa.* returned *scire feci*, only issues, and proceedings are by bill. *Bell v. Jackson*, 4 Term Rep. 663. contra N. on R. E. 5 Geo. 2. 2 Jon. 228. *Com.* 53. *Salk.* 599. *Skin.* 633. And *Mod. Cas. L. & Eq.* 355, proceedings were staid, because there were four days only between the *teste* and return.

If only one *sci. fa.* by bill, four days between *teste* and return.

Every *sci. fa.* by original, ought to have fifteen days inclusive between the *teste* and return, unless helped by stat. 16 Car. 1. c. 6, and 13 Car. 2. c. 2. N. on R. 8 W. 3.

If by original, fifteen days.

Motion to stay proceedings on *sci. fa.* because it was not served till the day before the return. *Sed per Curiam*, if it lays four days in the office, that is all which is required; the summons may be made any time before the court is up, on the day of the return. *Obrian v. Frazier*, 1 Str. 644. *Bland v. Perry*, so ruled again in T. T. 4 Geo. 2, on great debate. *Vide* 3 Burr. 1360. *Hunt v. Coxe*, *Barnard.* K. B. 344.

When may summon.

First *sci. fa.*
left one day
before return
will do.

The general practice upon two *sci. fa.*'s is, to leave the first one day before the return for a *nihil*, which is thought to be a sufficient time within the rule of E. 5 Geo. 2.

If returned
sci. feci.

To revive a judgment, it is seldom that the party is warranted by the sheriff; but if he is, the *scire facias* must be left at the sheriff's office, and a summons taken thereon, directed to an officer; pay 2s. 6d. who will serve it; pay him 5s.

How to be
sued out.

To be ingrossed on a 5s. stamp parchment, which take to Messrs. *Provost* and *Chambre*, with a *præcipe*, who will sign it; pay 1s. 8d. seal 7d. A warrant I think is necessary to be filed. If left for a return of *nihil*, take it to the sheriff's office, pay 1s. for each defendant: upon the return day, sue out an *alias*, sign and seal it as before, and leave it at the sheriff's office.

Alias.

Sci. fa. to be
as short as
possible.

A *sci. fa.* ought to be as short as possible, because it is of the nature of writs to set forth things very briefly; and a writ is therefore called a *brief*, from the *Latin* word *breve*, which signifies short or compendious, 2 Lill. 609. And must pursue the terms of the judgment 6 Term Rep. 1.

Præcipe.

Middlesex. Sci. fa. to revive for A. B. against C. D. for debt, and damages, returnable on, &c.

J. K. attorney.

*Scire facias in
debt.*

George the third, by the grace of God, of the united kingdom of *Great Britain and Ireland*, king, defender of the faith, to the sheriff of *Middlesex*; greeting: whereas A. B. lately in our court before us at *Westminster*, by bill without our writ and by the judgment of the same court recovered against C. D.

for a debt, and also s. for his damages which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record; and now on the behalf of the said A. B. we have been informed, that although judgment be thereupon given, yet execution for the said debt and damages still remains to be made to him; whereupon the said A. B. hath humbly besought us to provide him a proper remedy in this behalf; and we being desirous that what is right and just should be done on this occasion command you, (a) that by good and lawful men of

(a) If an *alias* say, "a before we have commanded you."

your bailiwick, you cause it to be made known to the said C. D. that he be before us at *Westminster*, on

Friday next after the morrow of All Souls, to shew if he has or knows any thing to say for himself, why the said A. B. ought not to have his execution against him for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do: and further to do and receive what our said court before us shall then and there consider of him in this behalf; and have you there then the names of those by whom you shall so make known to him, and this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign. (a)

George the third, &c. To the sheriff of *Kent*, greet- The like in assumpsit.
ing: whereas A. B. lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against C. D.

(b) for his damages, which he had sustained as well by occasion of the not performing certain promises and undertakings made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and now on the behalf of the said A. B. we have been informed, &c. (as in the other precedent, only leave the word "debt" out.)

For his damages which he had sustained, as well by The like in means of a certain trespass then lately committed by the trespass.
said C. D. at G. in your county, as for his costs, &c.

For his damages which he had sustained, as well by The like in occasion of a certain trespass and assault made by the trespass and
said C. D. on the said A. at B. in your county. assault.

For his damages which he had sustained, as well by If in covenant.
reason of a certain breach of covenant made by the said C. to the said A. as for his costs, &c.

(a) If the second *sci. fa.* be in the sheriff's office on the file, in proper time, that is sufficient, though not entered in the *sci. fa.* book. 3 *East*, 570. *Hayward v. Reynard*.

(b) In actions on the case, trespass and the like, the costs are added to the damages recovered, therefore the whole sum is taken together.

Sci. Fa. for and against Executors and Administrators.

Against an
administra-
trix in as-
sumpsit.

George, &c. Whereas A. B. lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against C. D. for his damages, which he had sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said C. is convicted, as appears to us of record, and now on the behalf of the said A. we have received information in our court before us, that although judgment be thereupon given, yet execution of the said damages still remains to be made to him; and the said C. D. is since dead intestate, and administration of all and singular the goods and chattels, rights and credits, which were of the said C. at the time of his death, was committed and granted to E. F. the widow and relict of the said C. in due form of law, as we have received information from the said A.; whereupon the said A. hath besought us to provide him a proper remedy in this particular, and we being willing that what is just and right should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said E. administratrix as aforesaid, that she be before us at *Westminster*, on next after to shew if she has or knows of any thing to say for herself, why the said A. ought not to have his execution against her, for the damages aforesaid, to be levied of the goods and chattels which were of the said C. at the time of his death, in her hands to be administered, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive (*as in the former one.*)

The like
against an
executor.

George, &c. to the end of the words "*yet execution of the damages still remains to be made to him,*" then say: "and whereas the said C. D. is since dead, having first duly made his last will and testament, and appointed E. F. executor thereof, as we have been informed in our said court before us; whereupon the said A. hath besought us to provide him a proper remedy, &c." (*as in the other, only say "executrix" instead of "administratrix."*)

Three execu-
tors and two
infants.

Three executors, two of whom were infants, he of full age proved, and he alone brings a *sci. fa.*, sets forth the truth, and obtains judgment. Error brought and as-

signed, that all ought to have joined. Held no error, for the others cannot prove the will during their nonage, and the judgment affirmed; for the execution shall not be delayed till the infants come of full age. *Hatton v. Mascall*, 1 *Lev.* 181. 2 *Saund.* 212, 213.

Goods of the testator, in the hands of his executor, cannot be seized in execution of a judgment against the executor in his own right. *Farr v. Newman*, 4 *Term Rep.* 620.

George the third, &c. Whereas A. B. lately in our court before us (as in the first *sci. fa.* to the word record,) yet execution of the said judgment still remains to be made, and the said A. is since dead, as we have received information from C. G. executor of the last will and testament of the said A. And now on the behalf of the said C. G. executor as aforesaid, in our said court before us, we have been informed that although judgment be thereupon given yet execution of the damages (or debt and damages) (a) aforesaid, still remain to be made to him; wherefore (a) If in debt. the said A. B. executor as aforesaid, hath humbly besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that by honest and lawful men of your bailiwick, you make known to the said C. D. executor as aforesaid, that he be before us at *Westminster* on next after to shew, &c. (as in the first *sci. fa.*) to shew if he hath, or knoweth of any thing to say for himself, why the said C. G. executor, as aforesaid, ought not to have execution against him for the damages aforesaid, according, &c.

And the said A. is since dead, as we have received information from E. administrator of all and singular the goods and chattels, right and credits, of the said C. D. deceased, and we being willing, &c. (as in the last.)

The like for an administrator.

How to proceed to Judgment.

When the sheriff has returned upon the first *sci. fa.*, *scire feci*, or a *nil* upon the first, and also *nil* on the *alias*; on the return day of the *alias*, or first *sci. fa.* (if only one is sued out, and a *sci feci* returned on it), give a rule at the clerk of the rules, which is wrote on a plain piece of paper thus, "A. B. against C. D. rule on *sci. fa.*" pay 3s. which expires in four days exclusive of the day it is given; and if the defendant does not appear, execution may then be taken out after the entry made of the

How to proceed after sheriff's return.

sci. fa. on the roll, with the clerk of the judgments. (a) The rule on the *sci. fa.* is like a rule for judgment on *postea* or inquiry, four full court days. *Watken and another v. Beaumont*, 11 East, 271. Sunday or a *dies non* is no day in such rule

How to enter judgment by default.

Get *alias sci. fa.* from the sheriff's office returned, then enter on the roll as far as the sum recovered, take same to the clerk of the judgments, and he marks the roll and the two *sci. fa.*'s, pay 2s. for the entry, which entry is as follows :

The entry of two *sci. fa.*'s.

Middlesex, } Our lord the king hath sent to his
to wit. } sheriff of *Middlesex*, his writ closed in these words, to wit, *George* the third, (to the end of the first *sci. fa.* *Law* and *Markham*, then on a new line) At which day before our lord the king, at *Westminster*, comes the said A. in his own proper person, and the sheriff, to wit, and

esquire, sheriff of the said county, returned to us, that the said C. had not any thing in his bailiwick, where or by which he could give him notice, as by the said writ he was commanded, or was the said C. found in the same; therefore as before it was commanded to the said sheriff, that by honest and lawful men of his bailiwick, he make known to the said C. that he be before us at *Westminster*, on (a) next after to shew in form afore-

(a) the return day of the alias.

said, if, &c. and further, &c. the same day is given to the said A. there, &c. at which day before our said lord the king at *Westminster*, comes the said A. in his proper person, and the sheriff as before returned that the said C. had not any thing in his bailiwick, where, or by which he could give him notice, as by the said writ he was commanded, or was the said C. found in the same; and the said C. although solemnly called, comes not, but makes default. Therefore it is considered, that the said A. have his execution against the said C. for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, by the default of the said C. &c.

Judgment by default.

If two *sci. fa.*'s of different terms.

If there be a *scire facias* of one term, and the second *sci. fa.* returnable the next term; enter the first on the roll of the term it is returnable, with an award of the

(a) The court have determined, that the *sci. fa.* must be searched for on the file of writs, kept at the sheriff's office, and not his book, if you complain of irregularity. *Hayward v. Reynard*, 3 East, 570.

second as far as the return day ; then docket it, otherwise you will have a *post terminum* to pay.

London (ss) Our lord the king hath sent to his sheriffs of *London* his writ, closed in these words, to wit, *George the third, &c. (to the end of the scire facias, Law and Markham; then on a new line.)*

The entry of one sci. fa. in London.

At which day, before our lord the king at *Westminster*, comes the said A. in his own proper person, and the sheriffs, to wit,

and sheriffs of the said city, returned to us, that they had made known to the said C. that he be before the king on the day and at the place in the said writ mentioned, as by the said writ they were commanded. The same day is given to the said A. there, &c. And the said C. although solemnly called, comes not, but makes default. Therefore it is considered, that the said A. have his execution against the said C. for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, by the default of the said C. &c.

Judgment.

Of the Appearance and Declaration.

If the defendant appears to the *scire facias*, and the *Appearance* suit be by bill, he does it by a note in writing delivered to plaintiff's attorney, before the end of the four days, after the rule on the *sci. fa.* is given, thus: "A. B. against C. D. I appear for the defendant upon the writ of the *scire facias* issued in this cause,

"J C. attorney." (a)

A memorandum or warrant, on a 5s. stamp, is necessary.

If the attorney does appear to the *sci. fa.* then declare *If appearance* against him in this form:

— term, 57th *George* the third.

Middlesex (ss) Our lord the king sent to his sheriff of *Middlesex*, his writ closed in these words, to wit, *George the third, (to the end of the entry on the roll, as far as the return of the sheriff to the second sci. fa. if there are two, then say,)* at which day before our said lord the king, at *Westminster*, comes the said C.

Declaration on a *scire facias* to revive the judgment.

(a) All issues and demurrer books on *sci. fa.* are to be made up by the attorneys. R. T. 12 W. 3. N. a.

by J. B. his attorney, and hereupon the said A. prays that execution may be adjudged to him against the said C. of the debt and damages aforesaid, according to the force, form and effect of the said recovery, &c.

How to entitle declaration.

A declaration on a *sci. fa.* returnable the last return of a term, may be entitled of the same term generally. *Vide 3 Wils. 154. Ward v. Gansell.*

How to engross same.

To be engrossed on a four-penny stamp paper, charge 8d. per sheet drawing, and 4d. for the copy, beside stamps; and all the proceedings are to be delivered to the attornies by bill as well as original, and the plaintiff's attorney makes up the issue. A rule to plead is to be given, and plea demanded, and all proceedings are the same as in other cases. If there be an issue, you begin with the declaration only, there being no memorandum in this case.

Scire facias may be amended.

If the *sci. fa.* is bad, it was formerly considered, that it could not be amended, but defendant might move to quash it. *Str. 401, Hiltier v. Frost.* But in *9 East, 316.* the court gave leave to amend the two writs of *sci. fa.* and the declaration thereon, conformably to the judgment roll. *Braswell v. Jeco, see 2 Bos. and P. 275.*

Where probate ought to be taken after final judgment and before revivor.

If final judgment be obtained against B. by A. who afterwards dies, his executor must take probate of his will, so as to recover his money, at Doctor's Commons, for the money is assets at *Westminster*, and the executor cannot maintain the *sci. fa.* without such probate. *6 Mod. 134.* So if administration is granted. *7 Mod. 15, Carlisle v. Greenwood.*

How far it is a continuation of the former action.

A *scire facias* to revive a former judgment, is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error, in that former action, such agreement shall bind his executors upon the *scire facias* being brought against them. *1 Term Rep. 388. Wright v. Nutt.*

Sci. fa. by baron and feme on a judgment recovered by feme whilst sole, if after

Baron and feme brought a *sci. fa.* upon a judgment recovered by the feme, *dum sola.* After execution awarded, the feme dies: it was held, it survived to the husband. *3 Mod. 186. Salk. 116.*

Judgment against a feme sole, who after married; before execu-

execution awarded, she die, it survives to the husband.

Judgment was recovered against a *feme sole*, who afterwards married; a *sci. fa.* was sued out against the husband and wife, and judgment against them; before execution executed, the wife died, and after her death,

a new *sci. fa.* was issued against the husband, and he was held chargeable; but he was not liable upon the first judgment. *Salk.* 117.

Judgment in ejectment, and after a year and a day, there was a *ha. fac. poss.* without bringing a *sci. fa.* and adjudged that a *sci. fa.* ought to be brought as well against the *tertenants*, as against the defendants. *Withers v. Harris*, 3 *Salk.* 319. *pl.* 1.

tion, wife died, the husband is chargeable.

In ejectment execution cannot be sued out after the year and day without *sci. fa.*

Proceedings by Original, on Sci. fa.

If the proceedings be by original, it is to be made out by the filazer of this court, as appears by the list of fees in 1722 and 1736, delivered into the house of commons; or for expedition it may be made out by the attorney for the plaintiff; pay signing 3s. 4d. sealing 7d. The late master doubted this, and informed me that it was signed by the chief clerk, but upon looking into the list of fees, I see no claim of the chief clerk for the signing the *sci. fa.* by original. The *alias* is also signed by the filazer; pay him 3s. 4d. signing, and sealing 7d. They are to be left at the sheriff's office for a return, in the same manner as by bill.

If *sci. fa.* be by original.

George the third, &c. to the sheriffs of *London*, greeting: Whereas A. B. lately in our court before us at *Westminster*, by our writ, and by the judgment of the same court, recovered, &c. (as in one by bill, to the word behalf,) and have there the names of those by whom, &c. Witness, &c.

Sci. fa. by original.

The return must be a general one, as, *on the morrow of All Souls wheresoever we shall then be in England.* And there must be fifteen days between the teste and return of each writ. A rule may be given on the return day of the second *sci. fa.* if it be not on a *Sunday*, with the clerk of the rules; when expired, sign judgment; but then it cannot be signed until four days after the *quarto die post* of the return of the second *sci. fa.* if there be two; if not, four days after the *quarto die post* of the first if returned *scire feci.*

As to the return.

Teste.

Rule.

A *scire facias* was tested, making both the teste and return inclusive of the fifteen days, and held well. *Salk.* 599. 2 *Jones*, 228.

As to teste and return two.

If Plaintiff or Defendant die after Interlocutory, and before Final Judgment, how to proceed.

At common law, the death of either party abated the suit; but now it is otherwise by the statute 8 & 9 W. 3, c. 11, s. 6, which enacts, that if any plaintiff die after interlocutory, and before final judgment, the action shall not abate, if it might originally be prosecuted by the executors, &c. of such plaintiff; and if the defendant die after interlocutory, and before final judgment, the action shall not abate, if it might originally be prosecuted against the executors, &c. of such defendant; and the plaintiff, or if he be dead after such interlocutory judgment, his executors, &c. may have a *scire facias* against the defendant if living, after such judgment; or if he died after, then against his executors, &c. to shew cause why the damages in such action should not be assessed and recovered. (a)

In a joint action cannot have sci. fa. against an administrator.

Where plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other who died, after interlocutory judgment: held, he could have a *sci. fa.* against his administrator; for notwithstanding the outlawry, the action remains joint, and therefore survived against the other defendant. *Fort and others, assignees, &c. against Catherine Oliver, administratrix, &c.* 1 *Maule and Selw.* 242.

How to proceed if plaintiff dies.

If the plaintiff dies after interlocutory judgment signed, and before inquiry, make out the following *sci. fa.* and if not returned *scire feci*, make out an *alias*, and proceed to judgment in the same manner as before stated.

Sci. fa. by an executor after an interlocutory judgment, and before inquiry executed.

George the third, &c. To the sheriffs of *London*, greeting: Whereas S. J. lately in our court before us, at *Westminster*, by bill without our writ, impleaded J. H. being in the custody of the marshal of our Marshalsea before us: for that whereas, (here recite the whole declaration) to the said S. J. his damage of 50*l.* as he said, and thereupon he brought suit, &c. and such were the

(a) This statute does not extend to cases where the party dies *before* interlocutory judgment; though after rule to plead expired. 1 *Wils.* 315. *Wallop v. Irwin.*

proceedings in our said court before us at *Westminster*, that afterwards, to wit, in *Hilary* term last past, it was considered by our said court before us, that the said S. ought to recover his damages. by occasion of the premises; but because it was unknown to our said court before us, what damages the said S. hath sustained by means of the premises aforesaid, we commanded you, that by the oaths of twelve good and lawful men of your bailiwick, you should diligently inquire what damages the said S. had sustained, as well by occasion of the premises, as for his costs and charges by him laid out about his suit in that behalf; and that you should send the inquisition, which you should thereupon take, to us at *Westminster*, at a certain day now past, under your seal, and the seals of those by whose oath you should take that inquisition, together with our writ to you for that purpose directed, as by the record and proceedings thereof, remaining in our said court before us at *Westminster* aforesaid, more fully and at large appear; yet inquisition of the said damages still remains to be made; and the said S. after interlocutory judgment had been given in form aforesaid, and before the return of our said writ of inquiry by us to you sent as aforesaid, for the purpose aforesaid, died, (a) having first duly made his last will and testament in writing, and appointed J. B. sole executor thereof, upon whose death the said J. B. duly proved the said will, in the prerogative court of the Archbishop of Canterbury, in due form of law, and took upon himself the burthen of the execution thereof, as by the said J. B. we are given to understand and be informed, wherefore the said J. B. executor as aforesaid, hath humbly besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that, by good and lawful men of your bailiwick, you make known to the said J. H. that he be before us at *Westminster*, on next after to shew if any thing he has or knows to say for him-

To be signed
and sealed
with Messrs.
Provost and
Chambre.

(a) Intestate, and administration of all and singular the goods, chattels, rights, and credits, which were of the said S. at the time of his death, was by ———, by Divine Providence Archbishop of Canterbury, primate of all England, and metropolitan, committed and granted to J. B. to wit, at aforesaid, as by the said J. B. we are given to understand, &c. 3 *Wils.* 235.

self, why the damages in the said action ought not to be assessed and recovered by the said J. B. executor as aforesaid, according to the form of the statute in such case made and provided, if it shall seem expedient for him so to do; and further, to do and receive what our said court, before us, shall then and there consider of him in this behalf; and have you there then the names of them by whom you shall so make known to him and this writ. Witness, &c,

Law and Markham,

Of Defendant's Appearance.

The defendant appears by delivering a note in writing to plaintiff's attorney, and the proceedings are not in this case to be filed with the clerk of the papers, but delivered to the attorney on each side.

Declaration. *London. (ss)* Our lord the king sent to his sheriffs of London his writ, closed in these words, to wit, (*here set forth the two sci. fa.'s as far as the return of the second, exactly as on the roll*), then say: And the said J. being solemnly called, comes by J. T. his attorney, and thereupon the said J. B. executor as aforesaid, prays that the damages in the said action may be assessed, and be recovered by him the said J. according to the form of the statute in that case made and provided; and the said J. brings into court here the letters testamentary of the said S. J. whereby it fully appears to the court here, that the said J. B. is executor of the last will and testament of the said S. and hath the administration thereof, &c.

Carth. 69.
6 Mod. 134.

If no appearance, how to sign judgment.

If the defendant does not plead after the rule is expired, then sign judgment as in common cases on a 10s. stamp, and give notice of executing the writ of inquiry, and proceed to final judgment as in other cases. Vide the form of the writ in Lilly's Entries 609.

How to make the entry after final judgment.

After final judgment is obtained on the inquiry, enter the same on the *scire facias* roll; therefore supposing it to be carried in, take the inquisition to *Westminster* for that purpose, pay 2s. 6d. The award of the inquiry, inquisition, and final judgment is to be added, by Mr. Edge.

Scire facias against an administrator of the defendant dying after interlocutory judgment, and before inquiry.

George the third, &c. To the sheriff of *Middlesex*, greeting: Whereas A. B. lately in our court before us at *Westminster*, by bill without our writ, impleaded C. D. being in the custody of the marshal of our *Marshalsea* before us: For that whereas (here go to the end of the declaration) to the damage of the said A. B. of 20l. as

he said, and thereupon he brought suit, &c. and such proceedings were thereupon had in our said court before us at *Westminster*, that afterwards, to wit, in Hilary term last past, it was considered by our said court before us that the said A. B. ought to recover his damages by occasion of the premises; but because it was unknown to our said court before us, what damages the said A. B. had sustained by occasion of the premises aforesaid; we therefore commanded you, that by the oaths of twelve good and lawful men of your bailiwick, you should diligently inquire what damages the said A. B. had sustained as well by occasion of the said premises, as for his costs and charges by him about his suit in that behalf expended, and that you should send the inquisition which you should ahereupon take to us at *Westminster* on next after

under your seal, and the seals of those by whose oath you should take the said inquisition, together with that writ. The same day was given to the said A. B. &c. as by the record and proceedings thereof, remaining in our court before us at *Westminster*, manifestly appear: and the said C. D. after interlocutory judgment had been given in form aforesaid, and before any inquisition taken on our said writ of inquiry by us to you sent, for the purpose aforesaid, died intestate, and administration of all and singular the goods, chattels and credits of the said C. D. hath been granted to M. D. the widow and relict of the said C. D. as we have been given to understand and be informed; wherefore the said A. B. hath humbly besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that by good and lawful men of your bailiwick, you make known to the said M. D. administratrix as aforesaid, that she be before us at *Westminster*, on next after to shew if any thing she has

or knows, to say for herself, why the said damages in the said action should not be assessed, and by the said A. B. recovered, according to the form and effect of the statute in such case made and provided, if it shall seem expedient for him so to do, and further to do and receive what our said court, before us shall then and there consider, &c. (as in the other.) Vide *Salk.* 315.

PROCEEDINGS AGAINST BAIL.

THE bail stipulate by their recognizance in this triple alternative, that the defendant shall if condemned in the

action, satisfy the plaintiff his debt and costs; or, that he shall surrender himself a prisoner; or, that they will pay it for him: (a) and when judgment is obtained, they stand liable to perform this contract, and may be compelled so to do; but before any immediate proceeding can be had against them, a *capias ad satisfaciendum* must be sued out against the defendant, into the county where the original action is laid, and left for a return of *non est inventus* by the sheriff of that county in his office, four days exclusive of the return day; the bail not being bound to render the principal, until they know what execution the plaintiff chuses to take. 3 Burr. 1360. Salk. 559. (b) No execution but a *ca. sa.* has effect to fix the bail, all others aiming at satisfaction by a seizure of the defendant's property, whereas this writ amounts to a demand on him to surrender himself a prisoner, which if not done by the return thereof, the bail (who may, on their own authority, take the defendant into custody, and by surrendering him, discharge themselves) having, it is presumed, made their election to perform the condition of their recognizance, the recognizance being thus forfeited, the plaintiff may either bring his action of debt thereon, or proceed by *scire facias* against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages.

Can only be brought in Middlesex.

The *sci. fa.* can only be brought in Middlesex, because it is always entered generally as taken in court, though taken actually by a judge at his chambers; and it is no record till entered. See the case *Coxeter v. Burke*, 5 East, 481. Whether the principal action were commenced by original, or by bill, and although the venue be laid in London. 1 Salk. 564, *Shuttle v. Wood*. 1 Burr. 409. *Bond v. Jaac*.

How to proceed.

But before a *sci. fa.* is sued out, or action commenced, it is necessary to make an entry of the recognizance with the clerk of the judgments; and the roll ought to be docketed, and carried in; the form of which see afterwards.

(a) By bill, they undertake to satisfy the debt and costs, or surrender. By original, the recognizance is taken in a penalty, being double the sum sworn to.

(b) But if the principal be in custody he will not be justified in such a return. 1 N. R. 255.

It was held in E. T. 35 Geo. 3, that the bail were not discharged by the principal's giving a *cognovit*; and court refused to grant a rule to enter an *exoneretur* on the bail-piece. *Hodgson v. Nugent*, 6 Term Rep. 277. (a)

Bail not discharged by a cognovit by defendant.

A return of *non est inventus* procured by the plaintiff against the principal, in order to found proceedings against the bail is irregular, if the principal were at the same time in custody of the sheriff who made the return, though 'at the suit of another person, and the subsequent proceedings will be set aside. *Burke v. Maine and another*, *bail of Renton*, 16 East, 2.

How to proceed by Action.

The only difference in the commencement of this action *By action* from that of all others by bill is, that the following *ac etiam* must be inserted in the body of the *latitat* or other process issued on this occasion, notwithstanding the defendants are not arrested thereon, but only served with copies, viz. in pursuance of R. E. 15 Geo. 2, after the words in a plea of trespass, there shall be inserted the following clause, "*and also to the bill of the said A. Ac etiam.* against the said B. in a plea of debt upon recognizance, according to the custom of our court, before us to be exhibited." Otherwise the defendant, or his attorney, shall not be bound to accept a declaration in debt upon such recognizance.

If this clause was not inserted, it would be a surprise *If not inserted.* on the bail, who, not knowing the cause of action, may let slip the time allowed them to surrender the defendant, and thereby discharge themselves. The bail cannot be arrested, let the amount of the debt be what it may. (b)

The rest of the proceedings are the same as in other Venue.

(a) But if plaintiff lays by for a length of time, and does not proceed against the bail, the court will interfere.

(b) The writ may be sued out on the return day of the *ca. sa. Shivers v. Brooks*, 8 Term Rep. 628. *Ld. Ray.* 1567. 2 Str. 8, 6. and the action may be against all, or several actions against each.

cases, only that the *venue* is to be laid in *Middlesex*, *Salk*. 564, 600, 659. Suing the bail below pending error in parliament, is a contempt and breach of privilege. 1 *P. Wil.* 685.

Teste and return of *ca. sa.*

A *ca. sa.* by original must have fifteen days between the teste and return to charge bail. *Stat.* 13 *Car.* 2. c. 2. If by bill, eight days are sufficient. *Salk*. 599. 602. *Ld. Ray.* 1177.

If plaintiff take the bail in execution, he cannot afterwards take the principal.

If the plaintiff sue the bail by action and take them in execution, he cannot afterwards take the principal, though one of the bail become bankrupt, and be discharged, and the other also be discharged on payment of 5s. in the pound, and upon an understanding that the plaintiff was at liberty to proceed against the principal. *Allen v. Snow*, 1 *Maule and Selw.* 341.

The bail must pay the costs of the actions on the recognizance, as well as debt and costs recovered, although they tender the original debt and costs before the eight days in which they had to render.

The bail not being able to surrender before the return of the *ca. sa.* the plaintiff, before the expiration of the eight days, within which bail are allowed to surrender, proceeded, and delivered a declaration conditionally; the bail offered to pay the original debt and costs, but not the costs against them of this action. *Motion, why the proceedings should not be staid on payment of the damages and costs in the original action.* *Buller, J.*—The bail ought to surrender their principal upon the return of the *ca. sa.*; if they do not, a cause of action accrues against them, and therefore the costs of the declaration delivered in the action against the bail, ought to have been tendered, before they had any ground for applying to this court to stay the proceedings. The allowing of the eight days after the return of the *ca. sa.* for the bail to surrender, is merely an indulgence given to them by the practice of the court; for they are liable, though the principal die after the return of the *ca. sa.* *Per Cur.* Upon payment of the costs in the former action, and the costs in the action against the bail, let the proceedings be staid. *Perrigal v. Mellish*, 5 *Term Rep.* 363. 15 *East*, 254. S. P.

If latitat be sued out and bail surrender in due time.

Although a *latitat* be sued out against bail on the recognizance, if the defendant renders within the eight days, and give notice, and gets bail exonerated, if the plaintiff further proceed, such proceedings will be set aside as irregular. For he does it at his peril, the rule, *Tria.* 1 *Anne*, having declared, that on such conditions, all fur-

ther proceeding shall cease. *Byrne v. Aguitar*, 3 *East*, 306. (a)

Bail having rendered their principal in time according to the practice of the court, are entitled to stay the proceedings in an action on their recognizance without costs, though the plaintiff commenced his action before he was served with notice of the render. *Smith v. Lewis*, 16 *East*, 168. 14 *East*, 599. 15 *East*, 254. 1 *Maule and Selw.* 742.

When bail is entitled to a stay of proceedings in an action on their recognizance without costs.

The court in *Smith and Lewis* said, that rule of *Trin. l Anne*, having directed that all proceedings against the bail should cease upon notice of the render, they were entitled to have the proceedings stayed unconditionally.

Time of Render when sued by Action.

It is ordered, that if any person or persons being, or hereafter shall become bail or manucaptors in this court for any defendant in any action whatsoever, and shall be impleaded by action of debt upon the recognizance in such suit acknowledged, such person or persons shall have liberty to render such defendant into the custody of the marshal of this court by the space of eight entire days in full term, next after the return of the writ of *latitat*, or other process, sued out against such bail, and upon notice thereof given to the plaintiff or his attorney (in the suit aforesaid, all further proceedings against such bail or manucaptors upon the recognizance aforesaid, shall cease. *R. Trin. l Anne*.

Time of rendering the principal, where bail are sued on their recognizance.

If there be but four days in term after the return of the writ of *latitat*, or bill of *Middlesex*, in an action against the bail, the defendant shall have eight entire days in the next term to render. The case in 1 *Ld. Raym.* 721, was before the above rule, where it was ruled otherwise. Vide further on, title *Render*.

If four days in term.

It is ordered, that where the plaintiff declares for, or recovers a greater sum than is expressed in the process on which he declares, the bail shall not be discharged, but

Bail liable for so much as in the affidavit, though the plaintiff declares for, or recovers more than in the process.

(a) By this rule if bail are impleaded in debt on the recognizance, they shall have eight days to render the defendant, and on notice thereof all further proceedings shall cease.

be liable for so much as is sworn to, and indorsed on the said process, or for any lesser sum which the plaintiff in such action shall recover. R. E. 5 Geo. 2. 6 East, 312. So ruled, though less than the sum acknowledged to be due, as well where the action is by original, as by bill. *Jacob v. Gotes.*

Explanation.

By this rule, no person being bail in court, or before a judge, shall, upon a recovery against the defendant, be answerable for any greater sum or sums than sworn to or indorsed on the writ or process on which the defendant was arrested (although one part of the condition of the recognizance is to pay the whole condemnation money, if the defendant does not:) and if a greater sum be recovered, he shall not be discharged, but shall be liable for such sum or sums as shall be sworn to, or indorsed, or any lesser sum that shall be recovered against the defendant in such action wherein he became bail, together with costs of suit. N. on the above rule. And the court in this cause, on motion, staid proceedings on the recognizance, on payment of the debt sworn to, and costs. *Jackson v. Hassel, Doug. 330.* See 1 East, 86, S. P. contra C. P.

If error allowed.

Where a writ of error is allowed before the expiration of the time given to the bail to render their principal, they may stay the proceedings against them, pending the writ of error, or undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. 11 East, 316. *Sprang v. Manprivatt*, sed vide 1 N. R. 67 in C. P.

How to proceed by Scire Facias.

Proceedings by sci. fa. against bail by bill.

THE regular mode of proceeding against the bail by *sci. fa.* by bill is, first get the bail-piece from the judge's chambers (if not already taken away), and take the same to Messrs. *Provost* and *Chambre*, who file it, pay them 4d. per term. But if the bail be justified in court, then get the same of the master's clerk, pay him 1s. and file it with *Provost* and *Chambre* (copy it first,) and only proceed against those that justified (if there are more on the bail-piece,) as they who did not justify may get leave to be exonerated *nunc pro tunc*. 4 Burr. 2107. *Humphrey v. Leite*. Then enter upon the roll, the declaration and recognizance of bail, with a memorandum of the term the declaration is of, which is to be docketed and filed in the

treasury chamber: in this case you will be obliged to pay a post docket, therefore get a number roll as of the term the declaration is of, at Mr. *Edge's*; pay 4s. 8d. and make a docket paper thus:

Entries of A. B. gent. one, &c. of the term of St. Hilary, 57-Geo. 3, 1817.

Middlesex. (a) Entry of a recognizance of bail between J. A. plaintiff, against C. D. and E. F. bail of J. C. Roll 860.

But if you have already carried in any rolls of that term, then the docket must be, "*the further entry of, &c.*" Take the roll to the clerk of the judgments, he will enter the recognizance, pay 2s. and mark the roll, for which pay 1s. more, if for a further entry; if not 3s. for the docket: then take it to the treasury at *Westminster*, and file it.

The carrying in the roll is now dispensed with, but not the entry; and it seems if it is filed any time before replication, it will be sufficient, if the bail plead *nul tiel* record; nor is there any occasion to file the *ca. sa.* till replication. 3 *Burr.* 1360. *Hunt v. Coxe.*

Roll and *ca. sa.* need not be filed till replication.

The principal died 14th *March*, 1795, after the return of the *ca. sa.*, but before the return was filed, a rule was obtained, calling on plaintiff to shew cause why an *exoneratur* should not be entered on the bail-piece, and why the filing of the *ca. sa.* returned by the sheriff should not be staid. *Ashhurst, J.*—We have been furnished by the officers of the court with the case of *Field v. Lahy*, determined *E. 24 Geo. 3. T. R.* which was thus: *Copper* shewed cause against a rule for staying the filing of the *ca. sa.* obtained by Sir *T. Davenport*, on a suggestion that the principal was dead. Mr. *J. Buller* read the case of *Hunt v. Coxe*, and *White v. Sackwell*. The court said there was no pretence for the motion, and discharged the rule. Therefore as this point has been determined so lately, when the former cases were considered, we think, that that case ought to govern the present, and consequently that this rule must be discharged. *Rawlinson v. Gunston*, 6 *Term Rep.* 285. *Field v. Lodge*, *E. 24 Geo. 3.*

The filing of the *ca. sa.* cannot be staid.

As yet of the term of St. Hilary, 57 Geo. 3, 1817. Witness Edward Lord Ellenborough.

London, (ss) Be it remembered, that on Thursday next after the octave of St. Hilary, in this same term, before

Entry of recognizance of bail.

(a) The county where the original venue is laid.

our lord the king at *Westminster* comes A. B. by J. K. his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against C. D. being in the custody of the marshall of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, A. B. and C. D. which said bill follows in these words, to wit, *London*, (*ss*) *here enter the declaration, to the words suit, &c.*

And the said C. D. by J. K. his attorney, comes and defends the wrong and injury, when, &c. and thereupon J. F. of, &c. and R. M. of, &c. (*the bail and addition exactly as in the bail-piece*) came into the court of our said lord the king, before the king himself at *Westminster*, in their own proper persons, and became pledges and bail for the said C. D. and each of them became pledge and bail for the said C. D. that if it should happen that the said C. D. should be convicted, at the suit of the said A. B. in the plea aforesaid, then the said A. B. and C. D. consented, and each of them did consent, that all such damages as should be adjudged to the said A. B. in this behalf, should be made of their and each of their lands and chattels, and levied to the use of the said A. B. if it should happen that the said C. D. should not pay the said damages, or render himself to the prison of the marshal of the *Marshalsea* of the lord the king, before the king himself, on that occasion.

Sci. fa. how
sued out by
bill.

One sci. fa.

As soon as the entry of the recognizance is made and entered, and the *ca. sa.* returned by the sheriff, prepares *sci. fa.* against the bail (which must be issued in *Middlesex*, although the *venue* in the original action be laid in *London*.) 1 *Burr.* 409. *Bond v. Isaac*, *Salk.* 564, 600, 669. 6 *Mod.* 42. *Holt*, 612. And if there are fifteen days between the teste of the first, and return of the second *by bill*, it is sufficient, without regard to the number of days between the teste and return of each. *Str.* 1139. And if one *sci. fa.* only is to be issued, four days exclusive are sufficient between the teste and return, *by bill*. *Bell v. Jackson*, 4 *Term Rep.* 663. Ingross it on a 5s. stamped parchment: Messrs. *Provost* and *Chambre* sign it, pay 1s. 8d. seal 7d. It may be tested on the return day of the *ca. sa.* if by bill, if by original, on the *quarto die post* of the return day: leave it at the sheriff's office for a return of *nihil*; (if you mean not to summon the bail,) pay

9s. On the return day, sue out an *alias*, teste it on the return day of the first *sci. fa.* sign and seal it, and leave it (four days exclusive before the return) at the sheriff's office, who will return it. Alias and teste.

The *alias sci. fa.* had not lain in the sheriff's office the last four days before the return; it was said on motion to set aside the *fi. fa.* issued against one of the bail, that it had lain there four days before the return day, it was returnable the 6th of *July*, and taken out of the office the 4th. *Per Curiam*.—The rule is, that the writ shall remain there the last four days: and the reason is, that the sheriff may, if possible, serve it. *Forty v. Hermer*, 4 Term Rep. 583. Rule abs. How long the writ of alias is to lie in the office.

But if you have only one *sci. fa.* which is to be returned *scire feci*, (a) get a summons from the sheriff, directed to an officer, who will summon the bail; and the summons is good, if left on the day of the return, before the rising of the court; but this *sci. fa.* is to be left in the sheriff's office four days exclusive before the return. R. E. 5 Geo. 2. Pay for summons 2s. 6d. officer for summoning each 5s. If only one sci. fa.

If the sheriff summon the bail *after* the rising of the court, on the return day of the *sci. fa.* though he return *scire feci*, court will set aside the proceedings. *Pool v. Willis*, 2 Term Rep. 758. If summoned after rising of court.

In *Webb v. Harvey*, 2 T. R. 757. the reporter states, that the bail were summoned *before* the rising of the court, whereas they were summoned at three, or half past three, in the afternoon of the return day, which was after the rising of the court; the court ordered (that as the bail had rendered in the evening of that day at a judge's chamber, but had not entered the *exoneretur*, nor render in the marshal's book) all proceedings should be set aside upon payment of costs. Same determination, but on terms, not having exonerated the bail.

It is sufficient to fix the bail, if they were summoned at any time before the rising of the court, on the return day. Lord Kenyon, 1 East, 88. *Clark v. Bradshaw*. If summoned before court rises, good.

(a) The bail cannot be served with the summons but in *Middlesex*; therefore if they live in another county, there must be two *sci. fa.*'s, returned nihil. The *sci. fa.* may be sued out on the return day of the *ca. sa.* if by bill. 8 Term Rep. 628. 2 Lord Raym. 1567.

So on the 5th of Nov. late in the evening. A summons on 5th Nov. at eight in the evening, on a *sci. fa.* returnable the 6th, held good. S. C. But the court will stay the proceedings against both the bail, on payment of the sum sworn to, and costs, although less than the damages recovered, or than the sum named in the process. *Ibid.*

Time enlarged for defendant to surrender a bankrupt under examination.—*Qu.* The time was enlarged to surrender a bankrupt, he not having passed his last examination. The plaintiff undertook in this case not to proceed to fix the bail before the first day of the next term. Mr. J. *Lawrence* doubted as to the propriety of making the rule moved for, he being the only judge in court. *Maude v. Jewett*, 3 *East*, 146. The bankrupt might have been brought before the commissioners by *ha. corp.* or they might have gone to the prison. The bail should have been bound for his forthcoming on the day, or paid the debt and costs.

If defendant's life in danger. It was refused, on an affidavit that the defendant could not be removed without endangering his life. *Wynn v. Petty*, 1 *East*, 102. *Nightingale v. Lowry*. So where the physician swore that it would most probably kill defendant to remove him, cited by the master. Or because of the unwarrantable arrest, and detention of the principal, by a foreign enemy. *Grant v. Fagan*, 4 *East*, 189.

Into what county to be sued. The *scire facias* being an original proceeding, must be brought against the bail in *Middlesex*, where the record is; for recognizances in this court are not obligatory by the caption, but by being entered of record. 2 *Salk.* 564, 600, 659. 7 *Mod.* 120. 1 *Burr.* 409. *Bond v. Isaac*. 5 *East*, 461.

If taken before a commissioner. But if bail be taken in the country before a commissioner, I think it has been determined, that the *sci. fa.* may issue in the county where taken. See *Lutw.* 1287. —*Qu.*

Sci. fa. in case. *George, &c.* To the sheriff of *Middlesex*, greeting: Whereas A. B. lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against C. D. (a) 15l. for his damage which he sustained, as well by

(a) If the action be in debt, say, "as well a certain debt of 100l. as also 20l. for his damages which he had sustained as well by means of the detaining the said debt, as for his costs and charges by him about his suit

reason of the not performing certain promises and undertakings made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record; and although judgment thereof be thereupon given, yet execution of the damages aforesaid still remains to be made to him the said A. B. and whereas J. F. of, &c. and R. M. of, &c. lately, (that is to say,) in *Hilary* term, in the 57th year of our reign, in our said court before us at *Westminster*, came personally in their own proper persons, and became pledges and bail, and each of them became pledge and bail, for the said C. D. that if it should happen the said C. D. should be convicted, at the suit of the said A. B. in the plea aforesaid, then the said J. F. and R. M. consented, and each of them consented, that (b) all such damages as should be adjudged to the said A. B. should be made of their and each of their lands and chattels, and levied to the use of the said A. B. if it should happen that the said C. D. should not pay the said damages, or render himself to the marshal of our prison of the Marshalsea before us on that occasion; as by the record of the said recognizance now remaining in our said court before us at *Westminster*, fully appears. Yet the said C. D. hath not yet paid the said damages, (c) or any part thereof, to the said A. B. or rendered himself to the marshal of our prison of the Marshalsea, before us on that occasion, as we have received information from the said A. B. wherefore the said A. B. hath humbly besought us to provide him a proper remedy in this particular; and we being willing that what is right and just should be done, command you, (a) that by honest and lawful men of your bailiwick, you make known to the said J. F. and R. M. that they be before us at *Westminster*, on next after to shew if they have or know, or either of them hath or knoweth, of any thing to say for themselves or himself, why the said A. B. ought not to have his execution

(b) As well the said debt, as all such damages.

(c) Debt and damages.

“ in that behalf expended, whereof the said *Richard* is convicted, as,” &c. and say afterwards, debt and damages.

(a) If an alias, say, “ as before we have commanded you.”

(a) Debt and damages. against the said J. F. and R. M. for the (a) damages aforesaid, according to the force, form, and effect of the said recognizance, if it shall seem expedient for him so to do, and further to do and receive all and singular those things which our said court. before us shall then and there consider of them in this behalf. And have you there then the names of those by whom you shall so cause it to be made known to them; and this writ. Witness, &c.

Law and Markham.

Præcipe. *Middlesex. Sci. fa.* for A. B. against J. F. and R. M. bail of C. D. for 25l. damages, returnable on next after

J. K. attorney.

When to be made returnable. The *scire facias*, if it be by bill, must be returnable on a day certain; by original, on a general return day, *whicunque*. 2 *Litt.* 499.

Rule for judgment, if by bill. On the return day of the first *sci. fa.* if it be returned *scire fesi*, or on the return day of the *alias*, if returned *nihil*, give a rule thereon, which is wrote on a piece of plain paper thus: "A. B. against F. and another, bail of "C. D. Rule on *sci. fa.*" The clerk of the rules enters it, pay 3s. it expires in four full court days; (a) having got the return from the sheriff, enter a part of the first *sci. fa.* as far as the sum recovered on the roll, take same to the clerk of the judgments, who will enter and mark the roll, pay 2s. an execution may then be sued out against them, either a *fi. fa.* or a *ca. sa.* *Str.* 1139. *Elliot v. Smith*, 1 *Lev.* 225. And though the *sci. fa.* may be against both, yet execution may be levied on one only. 1 *Sid.* 339.

But if there be a *nihil* returned on the first *sci. fa.* then no rule on the *sci. fa.* is given until the return day of the *alias*.

Entry of two *sci. fa.*'s and *nihil* thereon, by bill. *Middlesex*, (ss) Our lord the king sent to his sheriff of *Middlesex* his writ closed in these words, to wit, *George*, &c. (copy to the end of the first *sci. fa.*) At which day,

(a) The rule on the *sci. fa.* is in the nature of a rule for judgment. A Sunday or a dies non, though an intermediate day is not to be reckoned. 11 *East*, 272. *Watson v. Beaumont*. In the C. P. the four days are exclusive on this rule.

before our lord the king at *Westminster*, came the said A. B. in his proper person, and the sheriff, to wit, and sheriff of the said county, returned to us, that the aforesaid J. F. and R. M. had not, or had either of them any thing in his bailiwick, where or by which he could give them or either of them notice, as by the said writ he was commanded, nor were they, or was either of them, found in the same; therefore, as before, it is commanded to the said sheriff, that by good, &c. he make known to the said J. and R. that they be before our lord the king at *Westminster*, on (a) next after to (a) The return of the alias. shew in form aforesaid, if &c. and further, &c. the same day is given to the said A. B. there, &c. At which day before our said lord the king at *Westminster*, comes the said A. B. in his own proper person, and the sheriff as before returned, that the said J. F. and R. M. had not, or had either of them, any thing in their bailiwick, where or by which he could give them or either of them notice, as by the said writ he was commanded, nor were they, or was either of them, found in the same. And the said J. F. and R. M. although on that day solemnly required come not, nor did either of them come, but made default. It is therefore considered that the said A. B. have his execution against the said J. F. and R. M. of the damages aforesaid, according to the force, form, and effect of the recognizance aforesaid, by the default of the said J. and R. &c. Default of bail. Judgment.

If there be only one *sci. fa.* and it is returned *sci. feci*, If only one *sci. fa.* returned *sci. feci*, how to enter it. stop at the end of the sheriff's return, and then say, and the said J. F. and R. M. although on that day solemnly required, did not, nor did either of them come. It is therefore considered that the said A. B. have execution against the said J. F. and R. M. of the (b) damages (b) Debt and aforesaid, according to the force, form, and effect of the said recognizance, by the default of the said *John* and *Richard*, &c.

If there be two *sci. fa.*'s issue of different terms, the first must be entered of the term wherein it is returnable, and an award of the second is sufficient, without setting it forth at large. N. on R. E. 6 Geo. 2. Then enter the return of the second made by the sheriff and the judgment thereon. In this case you must have a number roll from the clerk of the treasury, docket same, and Mr. How to enter two *sci. fa.*'s of different terms.

Clarke will enter the two *sci. fa.*'s and mark them, which should be *filed in* the treasury with Mr. White.

How to appear.

If the bail appear, which is frequently the case, to get a term of the plaintiff, it is done by a note in writing, and there are no costs to be paid by them, unless they plead. See the stat. 8 & 9 W. 3. c. 11. s. 3. (a)

Costs.

How to proceed if bail appear.

If they appear, deliver a declaration upon a 4d. stamp, give a rule to plead, and demand a plea as in other cases; if the declaration be not delivered four days exclusive before the end of the term, the defendant will be entitled to an imparlance.

When defendant is entitled to an imparlance.

Declaration in *sci. fa.* against bail where they appear.

Middlesex, (ss) Our lord the king sent to his sheriff of *Middlesex* his writ closed in these words, to wit, George the third, (*copy the first sci. fa. and the return, to Law and Markham; and the award of the second as far as sheriff's return; the same day is given to the parties aforesaid, &c. then go on thus:*) At which day, before our lord the king at *Westminster*, comes as well the said A. B. in his proper person, as the said J. F. and R. M. by G. D. their attorney, and thereupon the said A. B. prays, that execution may be adjudged to him against the said J. F. and R. M. of the damages aforesaid, according to the force, form, and effect of the said recognizance, &c.

How to entitle the declaration.

The declaration may be intituled of the term generally, although the *sci. fa.* was returnable the last return of the term. 3 *Wils.* 154.

What the bail may or may not plead.

The bail may plead that defendant died before the return of the *ca. sa. Roll. Abr.* 336. That the plaintiff had other execution against him; that the defendant paid the money recovered. 1 *Roll.* 336. l. 21. 4 & 5 *Anne, c.* 16, s. 12. Or a tender of the principal. 3 *Lev.* 352. Or a release to the principal or bail. 1 *Ld. Ray.* 157. Or no *ca. sa.* sued out and returned. *Sty.* 281, 324. And if there be a void writ, it is as none. 6 *Mod.* 304. But they cannot plead, that the principal died before the return of the *sci. fa.* because if he died on the return day of the *ca. sa.* the bail are liable. 2 *Wils.* 67. They may plead *nul tiel* record of the recognizance. 1 *Roll.* 336. l. 35. *Thompson's Est.* 385. *Lord Ray.* 156.

See 2 East, 439.

(a) All pleas and demurrers, upon writs of *sci. fa.* ought to be delivered, and all issues thereon made up by the attornies. R. T. 12 W. 3.

If a *ca. sa.* on a *sci. fa.* against bail be made on a return day out of term, it is irregular, but not void, and only liable to be set aside for irregularity. *Campbell v. Cumming*, 2 Burr. 1187. Qu. If this might not be amended by the roll? Ca. sa. ret. out of term, not void, but irregular.

But if the writ of *ca. sa.* be merely *irregular* by making it returnable out of term, it is irregular, but not void. 2 Burr. 1187. *Campbell v. Cumming*.

If the principal die *after* the return of the *ca. sa.* and before filed, the bail are fixed, and the court will not stay the filing of the return, in favour of the bail. 6 Term Rep. 284: *Rawlinson v. Gunston*. If principal die after ca. sa.

If there be error brought by the principal, which is afterwards nonprossed with costs, yet the bail in the original action are not liable to the costs, because they only become bound to pay the condemnation money in that action and costs. 6 Term Rep. 288, *Yates v. Doughan*. Nor on affirmance. Bail below not liable to costs in error.

How to proceed by Original.(a)

The *ca. sa.* must be returnable on a general return day, *ubicunque*, &c. and must have fifteen days between the teste and return. Stat. 13 Car. 2. c. 2. This is much easier than the other, as it is the filazer's duty to enter the recognizance, and docket the roll; therefore, after the *ca. sa.* is returned *non est inventus* against the principal, take it to him for the *sci. fa.* who will make it out, pay 8s. 7d. with stamp, seal 7d. leave it at the sheriff's office: when it is returnable, apply to sheriff for it: if *nihil* is returned, then make out an *alias* yourself, which is a copy of the first, (excepting the *alias* part,) "therefore we command you, as formerly we have commanded you," being added; sign it with the filazer, pay 8s. 4d. seal 7d. How to proceed by original.

After the return of the second *sci. fa. nihil*, or of one *sci. feci*, give a rule on the *sci. fa.* as before, on the *quarto die post*. of the return day, at the clerk of the rules, which expires in four days after that day; then enter the same on the roll (if no appearance,) and take it to the clerk of Rule for judgment. 13 East, 391.

(a) The court will exonerate the bail on payment of the sum sworn to and costs, as well where the action is by original, as by bill. *Jacob v. Bowle*, 6 East, 312.

the judgments, who enters same, pay 2s. the judgment by default is as before.

If defendant be sued by original in London, and bail put in in Middlesex, a sci. fa. in Middlesex is irregular, and will be set aside, it being as no bail.

The defendant was sued by an original in London, and *non est inventus* being returned, on the first *capias* he was afterwards arrested on an *alias capias* (a) in Middlesex, and bail put in with the filazer in Middlesex. Final judgment was afterwards entered in Hilary term, and a sci. fa. sued out against the bail in Middlesex. Motion to set aside the proceedings for irregularity, as the sci. fa. ought to have been sued in London. Court held the proceedings to be irregular. The bail ought to have been put in in London; but being put in in Middlesex, it was the same as if no bail had been put in. He could not proceed against the bail in Middlesex, there being no prior proceedings to warrant it. *Harris & an. v. Calvert*, 1 East, 603.

To be now brought in Middlesex.

It is now settled, that the writs of *scire facias* and *alias* are to be brought in Middlesex, where the recognizance is recorded. *Coxeter v. Burke & an. bail of Price*, 5 East, 461. Though the *venue* is laid in London. 1 Burr. 409, S. P. Salk. 564. *Holt Rep.* 612.

Cannot levy costs on a sci. fa. against bail by original, though there is a penalty.

The condition of the recognizance by original differs widely from that by bill, as the former is in a penalty, and the latter generally to render; therefore it became a question, whether levying against the bail, the costs of the sci. fa. out of the penalty, was legal; and it was held, that though equitable costs may be levied out of the penalty of a bond, yet it was too hard to suffer it to be levied against the bail; and the overplus money was restored to them. *Str.* 826. *Baldwin v. Morgan*.

Of the Appearance. (b)

The filazer receives the appearance for bail and warrant. But there never was an instance of common bail being filed. I should advise the appearance to be entered with him, and giving notice of same to the plaintiff's attorney, that it is entered.

(a) It should have been stated a *testatum capias*.

(b) The plaintiff obtaining an award of execution, after plea pleaded to a sci. fa. pleaded, or demurrer, joined, shall recover costs. 8 & 9 W. 3, c. 11, sect. 3.

After appearance by bail, proceed as by bill, by declaring against them, &c.

The execution in *scire facias* is governed by the award of it, and though in the case of bail, the recognizance be to levy of the lands and chattels, yet execution of the body by *ca. sa.* is good, 1 *Lev.* 226, according to the custom of the court. *Gill. Exec.* 69. And it may be sued out without first issuing a *fi. fa.* and getting it returned *nulla bona.* 2 *Str.* 1139, *Elliot v. Smith.* But a *ca. sa.* will not lie on a recognizance of bail in C. P. *Lutw.* 1280. 2 *Taunt.* 112. 1 *Roll. Abr.* 807.

May have a *ca. sa.* against the bail.

If one of the principals be taken, and not the other, the bail are not discharged (unless the debt and costs be paid.) 2 *Lev.* 195. But if the principal be taken in execution, the plaintiff cannot afterwards take the bail. *Cro. Jac.* 330.

Fi. fa. in case.

George the third, &c. To the sheriff of *Middlesex*, greeting: we command you, that of the goods and chattels in your bailiwick of J. F. and R. M. the bail of C. D. you cause to be made 40l. which A. B. lately in our court before us at *Westminster*, recovered against the said C. D. for his damages which he sustained, as well by means of the not performing certain promises and undertakings lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record:

Ca. sa. in case.

George the third, &c. To the sheriff of *Middlesex*, greeting: we command you, that you take J. F. and R. M. the bail of C. D. if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on next after to satisfy A. B. 100l. which the said A. B. lately in our court before us, recovered against the said C. D. for his damages which he sustained, as well by means of the not performing certain promises and undertakings lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record:

To be sealed only, ingrossed on a 5s. stamp.

And whereupon it was considered in our same court before us, that the said A. B. have his execution against the said J. F. and R. M. for the said damages, costs and charges, according to the force, form, and effect of a

certain recognizance acknowledged by them the said J. F. and R. M. in our said court before us, for the said C. D. at the suit of the said A. B. in the plea aforesaid, by the default of the said J. F. and R. M. as likewise appears to us of record;

and have you that money before us at *Westminster*, on next after

to render to the said C. D. for his damages, costs, and charges aforesaid; and have there then this writ. Witness, &c.

and have you then there this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign.

Testatum fi. fa. (a)

After the words "for the debt and damages aforesaid," say, and our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said J. F. and R. M. had not, nor had either of them, any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof; whereas it is testified in our same court before us, that the said J. F. and R. M. have sufficient goods and chattels in your bailiwick, whereof you may cause aforesaid, and every part thereof; and have there then this writ. Witness, &c.

Testatum ca. sa.

After the word "record," say, and our sheriff of *Middlesex*, at a certain day now past returned to us, that the said J. F. and R. M. were not, nor was either of them found in his bailiwick, whereupon on the behalf of the said A. B. it is sufficiently testified in our same court before us, that the said J. F. and R. M. lurk and secrete themselves in your county; and have there then this writ. Witness, &c.

Fi. fa. in debt. (b)

George the third, &c. To

Ca. sa. in debt.

George, &c. To the she-

(a) There is no necessity for reciting the supposed first writ of *fi. fa.* or *ca. sa.* and then command the sheriff to levy; this is a much shorter way.

(b) If execution be taken against the bail, and they pay part, yet the plaintiff may afterwards take execution against the principal for the residue, the bail having been previously set at liberty. 1 *Sid.* 107. *Cro. Jac.* 549.

the sheriff of *Middlesex*, greeting: we command you, that of the goods and chattels in your bailiwick of J. F. and R. M. the bail of C. D. you cause to be made as well a certain debt of 100l. which A. B. lately in our court before us at *Westminster*, recovered against the said C. D. as also 15l. 10s. which were awarded to the said A. B. in our same court before us, for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record:

riff of *Middlesex*, greeting: we command you that you take J. F. and R. M. the bail of C. D. if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on next after to satisfy A. B. as well a certain debt of 100l. which the said A. B. lately in our court before us at *Westminster*, recovered against the C. D. as also 14l. 10s. which were adjudged to the said A. B. in our said court before us, for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record:

And whereupon it is adjudged in our said court before us that the said A. B. have his execution against the said J. F. and R. M. for the said debt and damages, according to the force, form, and effect of a certain recognizance acknowledged by them the said J. F. and R. M. in our said court before us, for the said C. D. at the suit of the said A. B. in the plea aforesaid, by the default of the said J. F. and R. M. as also appears to us of record:

And have you that money And have you then there before us at *Westminster*, on this writ. Witness, &c.,
next after
to render to the said A. B.
for his debt and damages aforesaid, and have you then there this writ. Witness, &c.

What Time Bail have to render the Principal when the Proceedings are by Sci. fa.

Bail rendering on a sci. fa.

If the bail mean to acquit themselves of their recognizance entirely, and run no hazard of the death of the defendant, then they must render him in their discharge, before the return day of the *ca. sa.* if proceedings be by bill, but if the proceedings be by original, then on the *quarto die post* of the return of the *ca. sa.* as the death of the principal afterwards will not discharge them. 2 Cro. 195. Jon. 139. Str. 511. 2 Wils. 67. The defendant may render himself in discharge of his bail before or after the judgment. 6 Mod. 235.

How long the bail have to render, and when they are fixed on a sci. fa.

But if they do not render the principal on the return day of the *ca. sa.* then they have until the return day (if the proceedings be by bill,) *sedente curia*, of the first *sci. fa.* if it be returned *scire feci*; but if a *nil* is returned thereon, then until the return day, *sedente curia*, of the second *sci. fa.* N. on R. E. 5 Geo. 2. And if the proceedings be by original, they have till the *quarto die post* of the return of the first *sci. fa.* if returned *sci. feci*, if not, then till the *quarto die post* of the return day of the second. 4 Burr. 2134. *Bailey v. Smeathman*, 1 Wils. 270. If an action be brought, then eight entire days in full term, next after the return of the writ. R. Trin. 1 Ann. An intervening Sunday in this case is to be reckoned as one of the eight days. *Creswell v. Green*, 14 East, 537. 8 Term Rep. 422. *Wilkinson v. Vass*, eight days from the return of the writ. And where the plaintiff sued the bail on recognizance, who did not render the principal within eight days, and then plaintiff died, (after plea and demurrer in that action,) and his executors brought another action against the bail, court held, the bail had eight days from the return of the writ in the second action in which to render the principal. *Ibid*.

On action.

On recognizance taken in the C. P.

But if the action be brought in this court, against bail, on a recognizance of bail taken in C. P. they have the same indulgence, (of eight days in full term after the return of the writ against them,) to render, as if the recognizance had been taken in this court. *Fisher v. Branscombe*, 7 Term Rep. 355.

Bankrupt.

A bankrupt attending the commissioners may be taken by his bail, and surrendered in their discharge. *Ex parte Gibbons*, 1 Atk. 511.

Render after court up bad.

Per Cur.—The bail ought to render the defendant on

the *quarto die post* of the return of the second *scire facias* sitting the court, (where proceedings are by original,) and a render after the rising of the court at a judge's chamber is too late. *Simmonds v. Middleton*, 1 *Wils.* 270. 2 *Term Rep.* 758. S. P.

The court unanimously agreed, that it was right and necessary to adhere strictly to the established rules of the court, relating to the time and manner of bail surrendering the principal. They held, that a surrender at about half an hour after eleven at night on the last day, (which was the last day of the term,) without an actual bringing the defendant into court (which was then risen), or before a judge (none being accessable at that late hour,) in order to have an *exoneretur* entered upon the bail-piece, was not sufficient; though it was so late at night as to render the doing this impracticable; and though the defendant was actually delivered to a judge's tipstaff, and even lodged in the King's Bench prison, that very night, which the bail swore was the utmost that the very late notice they received from the sheriff of the *sci. fa.* (which was returned *scire feci*) gave opportunity to them to do. *Hunt v. Cox*, 3 *Burr.* 1360. 4 *Burr.* 2134. 13 *East*. 391. S. P. certified by Master *Owen*, that the bail has, by original, till the *quarto die post* to surrender (provided it be done *sedente curia*) *Bailey v. Smeathman*. See 2 *Term Rep.* 757. 1 *East*, 88. *Clarke v. Bradshaw*. S. P.

For the purpose of fixing the bail on *sci. fa.* the *ca. sa.* must lie the four last days in the office before the return; and the bail having once been prepared to render their principal in time, which they then omitted to do in consequence of a rule *nisi* taken out by them on the suggestion of the court, with a view to an arrangement out of court between the parties, (the principal being a lunatic,) which rule was afterwards discharged, without providing for the bail to be placed in the same situation that they were before; the court in a subsequent term permitted the bail to take the above objection to the regularity of the proceedings, though they had before, in the same term, before they were aware of this objection, brought forward another objection, which was overruled. *Cook v. Brockhurst and another*, 13 *East*, 588.

The court refused to enlarge the time to render the principal on account of the defendant's being a lunatic. *Cock v. Ball*, 13 *East*, 355.; it not appearing to the court, that he was in such a state as to occasion any immediate peril of life, either to himself, or to those about him.

How this rule is to be construed.

How long the *ca. sa.* against the principal must lie in the office.

Lunacy.

Of exonerating the Bail without a Surrender in their Discharge.

Peer or member.

If the plaintiff declare for a different cause of action from what is expressed in the process, or if he declare by original, in a different county from that where the action is brought, 3 Lev. 235. R. E. 2 Geo. 2. a. the bail are discharged; if the defendant dies, or becomes a peer of the realm, Dougl. 45. or member of the house of commons, Langridge, one, &c. v. Flood, esq. H. 26 Geo. 3. at any time pending the action, court, on affidavit of these facts, will order an *exoneretur* to be entered on the bail-piece.

Bankrupt.
Cow. 824.

In vacation, a judge will order it. So if defendant becomes bankrupt, and obtains his certificate pending the action, and before bail fixed; he may, by summons on affidavit of the *debt having accrued before he became bankrupt*, and *having obtained his certificate fairly and without fraud*, be discharged; but such certificate must be produced to the judge. 8 T. R. 609. 14 East, 599. But the bail not having applied in time to entertain an *exoneretur*, till after the money levied, they can only be relieved on payment of costs. Mannin v. Partridge and another, bail of Goodshall, *ibid.* So if he be already surrendered, he may apply to be discharged out of custody on the like affidavit and producing his certificate. (a)

Alien.

So the court will permit an *exoneretur* to be entered, if a defendant (*an alien*) be sent out of the kingdom, under stat. 33 Geo. 3. c. 4. unless bail are indemnified, or have money left in their hands to pay plaintiff. Merrick v. Vaucher, 6 Term Rep. 50. But court refused where 1000l. was left with the attorney who indemnified the bail, and a defence was made, to discharge the bail on payment of 1000l. Coles v. De Hayne, *Ibid*, 52. 246.

When the court will permit an *exoneretur* to be entered on the bail-piece.

The defendant having been convicted of felony and

(a) But where the validity of the commission is disputed, the court will direct it to be tried in a feigned issue, notwithstanding the certificate, before an *exoneretur* is entered. Willison v. Smith, E. 22 Geo. 3.

sentenced to transportation :—Rule why an *exoneretur* should not be entered on the bail-piece, on the ground it was impossible for them to render the defendant. *Fowler v. Dunn*. 4 Burr. 2034. was cited against the rule, but the court said, this was distinguishable from that case, where the difficulty arose from the defendant being actually on board a ship in the river Thames, ready to sail, and where the rule for a *habeas corpus* was refused on account of the inconvenience of bringing up the defendant at that period ; but there was no such difficulty in this case, the form of the motion being to enter an *exoneretur* on the bail-piece. Rule absolute. *Wood v. Mitchell*, 6 Term Rep. 247. Vide 2 Str. 1217. A *habeas corpus* used to be granted for this purpose.

So an impressed seaman into the king's service when he is bailed on mesme process for a debt under 90l. 7 East, 405.

But where defendant was in custody under a charge of murder committed in *Ireland*, and a bill found, though the court granted a *habeas corpus* to bring him up to be surrendered, would not, without an actual surrender, allow a *exoneretur* to be entered. 7 T. R. 226. *Sharp v. Sheriff*.

If a bankrupt be in Newgate on a criminal warrant, and the bail wish to surrender him, they must apply for a *habeas corpus ad subjiciendum* on the crown side, to bring him into court, and a rule will be made on motion for his surrender, commitment to the marshal, and his being taken out of the marshal's custody, and re-committed to Newgate, charged with the several matters against him. *Taylor's case*, 3 East, 232. See 3 Bos. and P. 55. a lunatic brought by *habeas corpus* from *St. Luke's Hospital* to be surrendered.

If a bankrupt be in Newgate on a criminal warrant.

How if in actual Custody of Sheriff.

If the defendant be in custody of any sheriff, the bail may have *habeas corpus cum causa*, either in the term or vacation, to bring him before a judge, returnable immediately, in order to render him. 3 Burr. 1875.

If defendant be in actual custody of sheriff.

An impressed man may be brought up by his bail under the keeper of the Savoy by *habeas corpus*, committed to the marshal, and then remanded back again. *Bond v. Isaac*, 1 Term Rep. 339. But why not, as in the case of *Wood v. Mitchell*, apply for *exoneretur* to be entered, without the expence of a *habeas corpus* ?

Impressed man in custody.

The court on the application of the defendant's bail, granted a *habeas corpus* to the sheriff of H. in whose

So if in custody for felony.

custody the defendant was under a charge of felony, to bring him up in order that he might be surrendered by his bail. But the bail must first justify to entitle themselves to make such an application. *Sharp v. Sheriff*, 7 Term Rep. 226.

But bail must first justify. It is ordered, that bail shall and may be at liberty to render the defendant (notwithstanding a rule to bring in the body has been served) at any time before the expiration thereof, (without a justification;) the attorney for the defendant giving notice of such render to plaintiff's attorney, without delay, and making affidavit thereof. Rule, Tr. 33 Geo. 3.

Bail may now render before expiration of rule to bring in the body. The bail may now render the defendant before they justify after exception: so after an assignment of the bail-bond; and may afterwards apply to stay the proceedings on payment of those costs. *Edwin v. Allen*, 5 Term Rep. 401. *Meysey v. Carnell*, Ibid, 534.

May now render before justification; so after assignment of the bond. So if on exception to bail, notice be given of other bail, and only one of whom justifies, and the names of the former bail still remain on the bail-piece, the former bail not having their names struck out, may render the principal. *Rex v. Sheriff of Essex*, 5 Term Rep. 633.

So if one of the bail justifies, though new bail, yet old bail may render, if not exonerated. Bail in error. Bail in error cannot surrender the principal, although he become bankrupt. 1 Term Rep. 624. *Southcoate v. Braithwaite*; for the recognizance is to pay.

How to render the Defendant, and exonerate the Bail

How to render defendant. The name of the cause, and how far the plaintiff has proceeded therein, is material for the judge's clerk to have; if before declaration, the clerk should have the sum sworn to: the defendant must be present, and the clerk will make out the commitment and surrender, for which pay 9s. 6d. if one cause, tipstaff 10s. 6d. and give him 3s. 6d. for the certificate of the surrender, which he will bring with him, and deliver to you: as soon as the bail have rendered the defendant, notice is to be given to the plaintiff's attorney, and an affidavit of the service made.

Notice to be given of the render. Ordered, that where any defendant shall be rendered into the custody of the marshall, in discharge of his bail, the attorney shall, without delay, give notice of such render to the plaintiff's attorney, and shall make affidavit thereof, before the bail in that action shall be filed or discharged, and in default thereof, such render shall be void. R. T. 1 Ann.

But it hath been held, that though notice is not given of the render, yet if plaintiff proceeds further against the bail, that shall not vitiate the surrender; but the bail shall not be delivered, till they pay the costs. 6 Mod. 238. 8 Mod. 281. 5 Term Rep. 368. 8 T. R. 222. *Le Pine v. Barratt*.

If not, liable to costs, or shall not be delivered.

Ordered, that when any prisoner surrender, or is surrendered in discharge of his bail to the custody of the marshal, under the commitment shall be added, *in what state the cause or causes stand at the time of such surrender*; if before declaration, *the sum sworn to on the arrest*; if a declaration hath been filed or delivered, *then the sum sworn to shall be also added, declaration filed or delivered, issue joined, or interlocutory judgment signed*, as the case is; if after final judgment in debt *the debt and damages*; in other cases *the quantum of the damages*. R. E. 8 Geo. 3.

Prisoner surrendering, the state of cause to be added under the commitment.

When notice has been given to plaintiff's attorney of the render, make affidavit thereof, and swear same before a judge; go to the judge's clerk, where the bail-piece is filed, deliver him the affidavit, and he will give you the bail-piece; take same, with the certificate of the clerk of the papers, to the master, and he will enter an *exoneretur* thereon; pay him 2s. 4d. file the bail-piece with Messrs. Provost and Chambre, pay 4d. As soon as the bail are exonerated, go to the clerk of the judgment office, and enter the surrender in the *marshal's book*, with Mr. Clarke, and the defendant's commitment.

How to get an *exoneretur* entered by bill.

If by original affidavit to be taken to the filacer.

The marshal's book is of no authority, but meant for his convenience, that he may see what persons are charged in custody: it is a memorial of, and not the cause or foundation of such charge and detainer. 2 Burr. 1049. *Hutchins v. Kendrick*, 2 Str. 1215. See 1 Salk. 98, 272. *contra*. (a)

The marshal's book.

Where the bail-piece has been previously delivered out to be filed to the plaintiff's attorney, who neglects to file it, he cannot proceed against the bail, for want of an *exoneretur* being entered. 8 Mod. 280.

If bail-piece be delivered to plaintiff's attorney who neglects to file it.

(a) See *Tidd*. 6 Ed. 283. who says, until such entry is made defendant is not in custody, so as to charge the marshal with an escape; but the authority he cites is, that for want of the *committitur in execution* being entered on record the prisoner is supersedeable. 2 Str. 1215.

If exoneretur be not entered and bail-piece filed, must pay subsequent costs to get exoneretur entered. In case the exoneretur is not entered, and bail-piece filed, the bail remain liable, though the defendant be a prisoner. 1 *Salk.* 98. 8 *Mod.* 282. But upon getting an exoneretur entered, the court will order an exoneretur to be entered upon paying costs accrued subsequent to the render, 1 *Burr.* 409. *Bond v. Isaac.* Say. 7. I think in variation a judge's order may be obtained.

In the King's Bench.

A. B. C. D.

Notice of surrender.

Take notice, that the above defendant did this day surrender himself in discharge of his bail, and was thereupon committed by the honourable Mr. Justice to the custody of the marshal, &c. there to remain until, &c. Dated the day of 1817. Your's, &c.

Affidavit of service.

J. P. clerk to J. D. of &c. gentleman, maketh oath and saith, that he did serve Mr. J. K. the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk or servant of the said Mr. J. K. at his chambers in Clement's Inn, in the county of *Middlesex*.

When to be given.

The notice need not be given before the rising of the court, on the day of the render. If it be given any time in the day it is sufficient. *Lord Ellenborough. Wiggins v. Stephens,* 5 *East*, 533.

There is no occasion for the form of the entry in the marshal's book, as you will see many there.

Principal rendering himself, the reddidit se, &c. to be left with the secondary, or judge's clerk; and a note for the marshal.

Ordered, That where any person shall render in court, or before a judge in discharge of his manucaptors, or shall be brought here in court upon a writ of *habeas corpus*, &c. in order to be committed to the custody of the marshal, such *reddidit se*, or writ of *habeas corpus*, with the return thereof, shall be left with the secondary, or the judge's clerk before whom such person was rendered, or brought to be filed; and that a copy or note of such render or return of the writ of *habeas corpus* under the hands of such justice, or the secondary, shall be delivered to the marshal at the time of the commitment. *R. T. 3 Ann.* Such copy or note is made by the judge's clerk.

May take principal on a Sunday.

The bail may take the principal on a Sunday, and keep him till the next day, and then surrender him. 6 *Mod.* 231. But they must stay with him, or take a note from him, consenting to stay at a lock-up house till a judge comes to town, so as to render him. See 2 *H. Bl.* 120.

Of staying Proceedings against the Bail, (or the Principal upon the Judgment,) where a Writ of Error is brought by the Principal before the Time expires for their Surrender.

A writ of error does not prevent the plaintiff from proceeding by action of debt on the judgment, against the principal, or by *sci. fa.*, or action of debt on the recognizance, against the bail: in such cases, however, if error be brought, and not mentioned for the purpose of delay, the court will stay the proceedings upon terms, pending the writ of error.

A writ of error is no stay of proceedings on the judgment by action.

If an action be brought against the principal on the judgment pending error, and he be held to bail, before he can apply to stay these proceedings, he must put in bail, and perfect them. (a) 5 Term Rep. 9. *Smith v. Shephard*, 6 Term Rep. 455. *Bickwell v. Longstaffe*.

Must put in bail before motion.

If an action be brought on the recognizance against bail, an appearance must be entered previous to this motion; or if there be a *scire facias* against the bail, they must first appear. *Ibid*.

If an action on the recognizance.

The plaintiff recovered judgment against the principal, and took out a *ca. sa.* and had a *non est inventus* returned; of this judgment error is brought, and two days after the plaintiff sues out a *sci. fa.* against the bail, who now moved to stay the proceedings upon the *sci. fa.*, as is done in cases where, pending error, the plaintiff brings an action of debt upon the judgment; insisting it was more reasonable in this case, because otherwise the bail might lose the advantage of discharging themselves by a surrender of the principal, which they can do at any time before the return of the second *sci. fa.* *Cur.* thought it reasonable that the proceedings should be staid, on the bail's consenting, that if the judgment be affirmed, they would render the principal, or give judgment on the *sci. fa.* *Str.* 419. *Meyer v. Arthur*.

Proceedings against the bail staid, pending error by the principal.

It is now generally understood, that where error is brought by the principal within the time allowed by the court for the surrender of defendant by his bail, the court will, upon application, stay the proceedings against them till the writ of error shall be determined, they undertak-

If bail apply within time the terms to stay proceedings are, that they pay or render within four days after affirmance.

ing to pay the plaintiff the damages recovered, or surrender him within four days next after the determination of the writ of error, in case the same is in favour of defendant in error. *Capron v. Archer*, 1 Burr. 340. 11 East, 316, S. P. *Sprang v. Monprivat*.

If they do not apply in time.

Per Cur.—Where the bail do not apply to stay the proceedings pending error, till their time to surrender is out, we will not give them any time for that purpose: but only four days to pay the money, after the judgment is affirmed. *Richardson v. Jelly*, 2 Str. 1270.

Writ of error stops all proceeding against bail, so that you cannot call for the sheriff's return.

Plaintiff took out a *ca. sa.* 3d December, on 4th a writ of error was allowed: notwithstanding which, he called for a return of *non est inventus*, and then waiting till the writ of error was at an end, proceeded by *sci. fa.* against the bail. The whole proceedings were set aside: for the ground of them, viz. the return of *non est inventus*, was obtained after notice of the writ of error, which stopped all sort of proceedings. *Smith v. Nicholson*, Str. 1186. 2 Lord Raym. 1260.

Cannot get *ca. sa.* returned though error brought after it is left at the sheriff's office.

Ca. sa. lodged in the sheriff's office the 13th May: the 19th a writ of error was served; the 20th the plaintiff got the *ca. sa.* returned, and then brought his action on the recognizance. Lord Kenyon—The proceedings against the bail are clearly irregular; the sheriffs could not make a return to the writ until the 20th, before which time the writ of error was allowed and served. Rule to set aside proceedings absolute. *Perry v. Campbell & an.* 3 Term Rep. 390. Str. 867, S. P. *Sweetapple v. Goodfellow*. S. P. 1 East, 662, *Miller v. Newbald*. Error was allowed the 3d of June, the *ca. sa.* returnable the 5th, and about four in the afternoon of same day the *allowance* was served; after which the *ca. sa.* was returned, and *sci. fa.* sued out. Proceedings set aside for irregularity.

Will not stay proceedings pending error till bail put in.

But if a writ of error is brought by the principal, and no bail is put in, if bail is required so as to make it an *absolute supersedeas*, the court will not stay the proceedings against the bail. Str. 781. *Hunter v. Sampson*. See also 1 Str. 526. *Fisher v. Emerton*. S. P. (a)

If execution.

If plaintiff obtains execution on *scire facias*, against

(a) Court said, by not applying in time, the bail have submitted to meet the sheriff. *Fieri non debet, factum valet*.

bail, pending error, the court will not set it aside. *Str.* 526, *Fisher v. Emerton*.

After judgment on *sci. fa.* against bail, motion to stay execution, the principal having brought error, and the bail undertaking to pay the condemnation-money and the costs on the *sci. fa.* in four days after affirmance; but in this case there being no bail on the writ of error, the court made the bail undertake also to pay the costs on the writ of error, in case the judgment was affirmed: and said it was a favour they were asking, and they would make them submit to equitable terms. *Riston v. Francis*, *Str.* 877. 3 *East*, 546. *S. P. Buchanan v. Alders and an.*

Where no bail is required, the bail applying to stay proceedings must undertake for the costs in error.

The defendants brought error in K. B. and afterwards in parliament, and then suffered a *non pros* on the first writ; after this, they moved to stay proceedings on the judgment pending the second writ, which the court refused, being vexatious. *Entwistle v. Shepherd*, 2 *Term Rep.* 79. It is discretionary in the court. Similar applications were made and refused, it appearing that the writs of error were brought for the purpose of delay. *Ibid.*

When the court will not stay proceedings.

If the bail undertake to pay the debt and costs within four days after affirmance in the Exchequer-chamber, and the judgment is affirmed, the defendant brings error in parliament, the plaintiff shall not have execution until the affirmance there, because that is the *final affirmance*. 5 *Burr.* 2819. *Kershan v. Cartwright*.

If they undertake to pay, and error is brought in the house of lords after, it is that affirmance which is meant.

The plaintiff obtained judgment against the principal, and he brought a writ of error, and transcribed, which remained undetermined; defendant was served with a writ on the judgment, and for want of plea, judgment signed against him by default, and execution issued, and the sheriff in possession. *Cur.* staid the proceedings upon it, as it would be unreasonable that the plaintiff should proceed in executing a judgment, which would of course fall to the ground, in case the original judgment should be reversed; but defendant was bound not to bring a bil in equity. 4 *Burr.* 2454. *Taswell v. Stone*.

Where there is judgment against the principal, court will stay proceedings till affirmance upon terms, though sheriff is in possession.

The defendant's attorney signed a *cognovit*, and in it had consented that the bail should stand a security for the debt. The court was moved for a rule to shew cause why that part of the *cognovit*, so far as to make the bail liable, should not be rescinded, and why the defendant's attorney should not pay the costs of the application; and on shewing cause, it appeared, that the

Cognovit signed where defendant had consented that the bail should pay the debt, *cognovit* rescinded.

bail were exonerated by the defendant's surrender in due time, and notice given. *Cur.* ordered that the bail should stand exonerated, and defendant's attorney to pay the costs of the application. *Simpson and another executrix v. Willet.*

Bail in error cannot surrender principal.

Error may be pleaded, by bail after the issuing, and before the return of the *ca.* 28.

If two become bail in error, they cannot surrender the principal, though he become a bankrupt pending the writ of error. 1 *Term Rep.* 624. *Southcote v. Brathwaite*; for their recognizance is to prosecute the writ of error with effect, or *pay the condemnation* with costs. 2 *Cro.* 402. 3 *Mod.* 87. *In what cases error is no stay of proceeding*, vide title *Error*. A writ of error allowed, before the *ca. sa.* returnable, is a supersedeas, and may be pleaded by the bail, to have been issued and allowed after the issuing, and before the return of the *ca. sa.* so as to avoid proceedings against them in *sci. fa.* prosecuted after the return by the sheriff of *non est inventus*, made pending such writ of error. *Sampson v. Brown*, 2 *East*, 439. *Salk.* 321. 1 *Vent.* 31.

NONPROS FOR NOT DECLARING.

For not declaring.

The statute extend to all cases. 2 *Term Rep.* 26.

If the plaintiff do not declare in due time, he is liable to be nonprossed, or have judgment against him for not prosecuting his suit. By the *stat.* 13 *Car.* 2. *stat.* 2. c. 2. s. 3. it is enacted, That upon appearance to be entered in the term wherein the writ, bill, or process is returnable, unless the plaintiff in any such writ, &c. shall put into the court from whence such writ, &c. did issue, his bill or declaration, against the person so arrested, in some personal action or *ejectione firmæ* of lands or tenements, before the end of the term next following after appearance, that then a nonsuit for want of a declaration may be entered against the said plaintiff. And the defendant in every such writ, bill, &c. shall or may have judgment to recover costs to be taxed, as on *stat.* 23 *H.* 8. c. 15.

General rule plaintiff must declare in 12 months, but if he do not deliver declaration within two terms he may be nonprossed.

By the general rules of law, a plaintiff must declare within twelve months after the return of the writ. But by the rules of the court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *nonpros*. Though unless he take such advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration within the year. *Orley v. Lee*, Mr. *J. Buller*, 2 *Term Rep.* 112. 3 *Term Rep.* 123. *Penny v. Harvey*.

But if the matter shall be under accommodation, or Further time. any thing should prevent the plaintiff's declaring within *two terms*, he may get a side-bar rule from the clerk of the rules for further time to declare (if defendant be not in custody,) and must serve defendant's attorney with a copy thereof, pay 6s. 6d.

The defendant did not file common bail *within two terms*, and plaintiff did not declare after the *end* of the *second term*; but before the third term, defendant filed bail, and entered a *nonpros*. On motion to set it aside, the master was of opinion, that a *nonpros* could never be signed, unless bail was filed *in the term* in which the writ was returnable. *Holmes v. White*, E. 11 Geo. 3. It is now held, that if a writ be returnable the first return of *Michaelmas* term, and an appearance entered the 22d Jan. by defendant, a *nonpros* being signed the 6th of March, for want of declaration, is good. *Prigmore v. Bradley*, 6 East, 314.

Bail must be sued in the term writ is returnable, or cannot non pros.

Writ returnable Michaelmas term, may file bail 22d Jan. and sign judgment of nonpros 6th March.

If the defendant files common bail *within the term* the writ is returnable, he has twelve months after to sign a nonpros; but he cannot do it at any time after. *White v. White*, E. 11 Geo. 3. But by the rule, M. 1654, s. 15. a nonsuit may be entered at the end of the second term on a continuance over by *dies datus*, but not the third term or after.

How long to sign a nonpros by bill.

If the action be by original, the defendant may sign his *nonpros* any time before the essoign day of the third term, without giving a rule to declare; but an appearance must be entered *the term in which the writ is returnable*.

By original.

If the writ be joint, and the appearance several, the defendant cannot sign several *nonpros*. *Comyn*, 74. 4 Burr. 2118. *Pryce v. Foulkes et al.*

If the writ be joint.

Latitat against four, and four nonsuits signed, held irregular, because the trespass is joint, and though plaintiff may count severally, yet it remains joint, till severed by the court. *Salk*. 455. *Allington v. Vavasor*.

One cannot sign nonpros where there are several defendants.

Writ against three, one arrested and put in bail, plaintiff not having declared within two terms, *nonpros* signed by him, the other two not having appeared. Court were of opinion, that in a joint action the plaintiff could not be *nonpros*ed by one, or some of the defendants without the others. *Powel v. White et al.* *Dougl.* 169.

The like.

The defendant and another were joined in the writ, declaration filed against the other only. A *nonpros* was

When a nonpros may be

- signed against one in an action against two. signed for not declaring by the present defendant, and held regular: and it was said that there had been cases where notice of declaration, and even taking out a rule to declare against *one defendant only*, have been held sufficient severance of the action, so as to *entitle the other* to sign *judgment of nonpros*. *Roe v. Cock*, 2 Term Rep. 257. *Butler v. Upton*. S. P.
- Cannot non-pros if removed. If defendant removes the cause by *habeas corpus*, he cannot nonsuit the plaintiff for not declaring, for the plaintiff is not bound to follow him. *N. on R. Mich*. 16 Car. 2. But he must declare in two terms. *Ibid*.
- Nor can a prisoner. If a prisoner is *superseded* on *filing common bail*, he never can sign a *nonpros*, because he did not *file bail in the term in which the writ was returnable*. 5 Term Rep. 35. *Sherson v. Hughes*.
- Nor pending injunction. A *nonpros* cannot be signed pending an injunction. *Bowser v. Price*, E. 20 Geo. 3. nor for not adjourning an essoign. 2 Str. 1194. as there is no color for the essoign. (a)
- Court refused to set aside a regular non-pros in a qui tam action. Court refused to set aside a regular *nonpros* against plaintiff, who sued for a penalty on stat. of usury. It might have been a different consideration, in case the plaintiff had been the party *really injured*, and had sued in order to come at *justice and reparation* for such real injury. *Bennet qui tam v. Smith*, 1 Burr. 401.
- Ca. sa. or fi. fa. The defendant may take out a *ca. sa.* or *fi. fa.* for the costs of a *nonpros*. 1 Wils. 316. *Murray v. Wilson*.
- When an attorney will be ordered to pay costs. The court had made an attorney pay the costs of a *nonpros* where he refused to produce his client, on an order obtained for that purpose, and an affidavit that he could find no such man as the plaintiff. *Gwynn v. Kirby*, Str. 402. *Sayer Rep.* 172.
- May be set aside. A *nonpros* may be set aside for irregularity on motion, but it must be on affidavit of the facts.
- If an action be brought on a judgment of nonpros which is irregular, the whole proceedings may be set aside in one rule. A judgment of *nonpros* was signed, and an action was brought on the judgment—The *nonpros* was irregular; the defendant in this action obtained two rules, the one to set aside *the judgment of nonpros for irregularity*, the other to set aside *the proceedings in the*
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- (a) In this case plaintiff proceeded, and obtained judgment for want of a plea, and court refused to set it aside.

action on the judgment. The plaintiff obtained another rule *why the last of the two rules should not be set aside, as one rule would have answered the purpose of both.* Court—That as the original action was the *substratum* of the whole, if that failed, the subsequent proceedings had upon it, whether by execution or another action, also failed with it; and that the whole might be set aside in *one* rule. That it was the practice so to do in actions on bail-bonds; and that they ought for the sake of *œconomy* to adhere to that practice. *Rule absolute.* *Barlowe v. Kaye*, 4 Term Rep. 688.

Writ was sued out on the 14th March, returnable the first return of Easter term 25th April: the defendant being arrested 17th April, put in bail above, and afterwards surrendered. In Trinity term he was removed by *habeas corpus* from K. B. to the Fleet. On 1st Nov. declaration was filed against him in the C. P. and judgment of *nonpros* was signed on 6th Nov. in this court for want of declaration. *Buller J.*—If a prisoner be removed from the K. B. prison to the Fleet, before declaration delivered, the plaintiff has his *election* either to retain the cause *here*, and bring it back by *habeas corpus*, or to declare against him in the Fleet: Rule to set aside the judgment absolute. *Sherson & another v. Hughes*, 5 Term Rep. 35.

In order to sign a *nonpros*, get a roll, and enter thereon the warrant of attorney for the defendant only, and ingross the *nonpros* thereon, also ingross it on a 10s. stamp paper, which being done take the same to the clerk of the judgments, who will sign it, pay him 3s.

Defendant having surrendered in discharge of his bail in the K. B. removed himself by *habeas corpus* into the Fleet, and plaintiff declared against him there, after the end of the second term, after writ was returnable, a judgment of *nonpros* signed after was irregular. How to sign *nonpros*.

As yet of the term of St. Hilary, in the 57th year of the reign of king George the third. Witness, &c.

Middlesex, (ss) C. D. puts in his place J. D. his attorney, at the suit of A. B. in a plea of trespass.

Nonpros for not declaring upon a bill of *Middlesex*.

Middlesex, (ss) C. D. according to the form of the statute in such case made and provided, was served with a precept (a) of our lord the king, called a *bill of* (a) Writ or *Middlesex*, issued out of the court of our said lord the king, before the king himself, directed to the sheriff of *Middlesex*, returnable on next after from the day of *Easter* now last past, to answer A. B. in a plea of trespass (b): and the said *Joseph* at that

latitat. The return.

(b) If defendant be arrested, put in the *ac-etiam*.

day appeared by J. D. his attorney, according to the form of the statute in such case made and provided; and the said A. B. in the aforesaid court of our said lord the king, before the king himself, at *Westminster* aforesaid, hath not declared by his bill, or declaration, in any personal action, or in ejectment, against him the said A. B. before the end of term then next following, being the next term after the appearance of him the said C. D.: Therefore it is considered by his majesty's court here, that the said A. B. take nothing by his said precept (c), but that he be in mercy, &c. And it is further considered by the said court here that the said C. D. did recover against the said A. B. 60s. for his costs and charges laid out by him, about his defence in this behalf, by the court of our said lord the king here adjudged to the said C. D. and with his assent, according to the form of the statute in such case made and provided; and that the said C. D. have execution thereof, &c.

(c) Writ.
Judgment
signed the
day of
1817.

Nonpros cannot after declaration delivered, be signed. If the defendant could have signed a *nonpros* for want of declaration at the end of the second term, and did not until a declaration was actually filed or delivered, it is irregular. *Orley v. Lee*, 2 Term Rep. 112. Executors and administrators pay costs of *nonpros*. 3 Burr. 1584, *Hawes, ex. v. Saunders*.

Nonpros for not replying, &c. The plaintiff may also be *nonprossed*, in any stage of the suit, for not complying with the rules of the court, viz. not replying to the defendant's plea, not surrejoinding to his rejoinder, not entering the issue (a) when served with a rule within the time allowed for that purpose, which is a final judgment, and is signed on a 10s. stamp paper, the master taxes these costs also.

Action will
lie for costs.

The costs now are taxed at 60s. for service of course, and if there be special bail, the master taxes the costs himself.

(a) Judgment of *nonpros*, for not entering the issue, cannot be signed, unless there be a rule to enter the issue of the same term in which such judgment is signed. *Lancaster v. Fraser*, 1 Maule and Selw. 478.

PROCEEDINGS BY ATTORNIES.

If an attorney sues *by original*, he waives his privilege; or if he sue in another's name, he does the same. 2 *Str.* 837. Therefore if he means to sue as a privileged person, he must issue out an *attachment of privilege*, which is signed by Messrs. *Provost and Chambre*, who take nothing, seal 7d. and a *præcipe* is to be left in the office. If bailable, affidavit must be made of the debt. But he may sue by common process, and indorse his own name on the writ, as the attorney. And he may also declare by another attorney, *Jackson v. Barnard*, 7 *Term Rep.* 35. And though he be in prison, he may sue by attachment for privilege, and need not indorse his name on the writ, 4 *Term Rep.* 275. *Fields, one, &c. v. Lewin*. His privilege only continues whilst he is practising, and has his certificate. 7 *Term Rep.* 25.

But may sue by common process and declare by attorney.

It is ordered that from and after the last day of this term, every attorney of this court who shall sue out any attachment of privilege against any defendant, shall leave a *præcipe* with the signer of the writs, with the defendant's names, not exceeding *four in each writ*, with the return and day of signing such writ, and the agent's or attorney's name who sued out the same; and all such *præcipes* shall be entered on the roll, where the *præcipes* of latitats, and all other writs issuing out of this court are entered: and the officer that signs the writs in this court, shall not sign such attachment till a *præcipe* be left with him for that purpose. R. H. 20, *Geo.* 2.

Attorney suing out an attachment of privilege against any defendant, to leave a præcipe with the signer of the writs.

An attorney, plaintiff, cannot sue an attorney defendant, (being both of the same court) by attachment of privilege, and hold him to bail; if he do, the court will discharge him out of custody, and stay the proceedings without costs. *Barber v. Palmer*, 6 *Term Rep.* 524. 8 *Term Rep.* 395. *S. P. Nichols v. Earle*. Or defendant may plead his privilege in abatement. *Ibid.* (a)

Attorney cannot sue an attorney by attachment of privilege.

An attorney shall not have his privilege against foreign

No privilege in foreign attachments.

(a) If plaintiff and defendant are attorneys of different courts, the plaintiff is allowed his privilege of suing the defendant by attachment. 2 *Str.* 837. 1 *Black. Rep.* 19. 2 *Black. Rep.* 1325. 4 *Bacon's Ab.* 227.

attachments in London. *Ridge v. Hardcastle*, 8 Term Rep. 417.

Attorney may sue by attachment though his certificate has expired. An attorney may sue by attachment of privilege, though his certificate has expired and not been renewed, if it be *within* a year from the expiration of his certificate, and though he has been in prison for above a year before the suing out of the writ. *Prior v. Moore*, 2 Maule and Selw. 605.

As to suing a person in Wales. If plaintiff, an attorney, sue, by attachment of privilege, a defendant *resident in Wales*, for words spoken there, and lay the *venue* in the *Welsh county* (in order that the cause may be tried in the next *English county*), and the judge at the trial certify, that the defendant was *resident in Wales*, &c.; that fact, thus certified, may be suggested on the judgment-roll, in order to entitle the defendant to enter a judgment of non-suit under 13 Geo. 3. c. 21. The plaintiff in this case might have exercised his privilege, by laying the *venue* in *Middlesex*. *Evans, one, &c. v. Jones*, 6 Term Rep. 500.

Attachment of privilege. George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you attach C. D. if he be found in your bailiwick, and him safely keep, so that you have his body before us at *Westminster*, on *Friday* next after the morrow of All Souls, to answer A. B. gentleman, one of the attornies of our court before us, according to the liberties and privileges of such attornies, and other ministers of the same court, from time whereof the memory of man is not to the contrary used and approved of in the same, of a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D. for 500l. upon promises, according to the custom of our court, before us, and that you have there then this writ. Witness *Edward Lord Ellenborough* at *Westminster*, the day of in the 57th year of our reign.

Law and Markham.

A. B. in person.

Bail for 250l. by affidavit filed.

To be ingrossed on a 5s. stamp parchment, and make a *præcipe* for the office, thus:

The præcipe. *Middlesex.* Attachment of privilege for A. B. gentleman, &c. against C. D. case for 500l. upon promises, returnable on *Friday* next after the morrow of All Souls.

Oath for 250l. by affidavit }
filed. }

A. B. in person.

If the action is not bailable, then leave out the *ac-etiam*, If action not and add the notice to appear to it, as in a *latitat*, or *bill* bailable. of *Middlesex*.

If the defendant appears he files common bail with If appearance. Mr. Smith, with a memorandum or warrant on a 5s. stamp.

The declaration is engrossed on a 4d. stamp paper, the form of which is as follows:

Middlesex, (ss) A. B. gentleman, one of the attorneys Declaration, of the court of our lord the king, before the king himself, being, according to the liberties and privileges of the same court, used and approved of in the same, from time whereof the memory of man is not to the contrary, present here in court in his own proper person complains of *Abraham Adams*, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; for that whereas (as in other cases; add pledges at the end.) The declaration for fees, and the proof necessary to support the declaration, will be found in my *Mod. Pleader*, with useful notes.

An attorney plaintiff is entitled to lay his *venue* in *Middlesex*, and it cannot be changed without his consent. Attorney may lay venue in *Middlesex*, and it cannot be changed without his consent. *Vide* title *Venue*. 2 *Salk.* 268. 3 *Term Rep.* 572. But *Middlesex*, but if defendant, no privilege of changing it. an attorney defendant has not the privilege of changing the venue into *Middlesex*, when it is laid in another county. *Pope & ux. v. Redfearne ux. &c.* 4 *Burr.* 2027. 3 *Mod.* 280. *Carth.* 126.

The time allowed for declaring upon an attachment of privilege, is the same as upon a bill of *Middlesex*, or *latitat*.

If an attorney delivers or files his declaration, and gives notice thereof, *four days exclusive before the end of the term wherein the attachment is returnable*, the defendant must plead as of that term, if rule to plead be given, and plea demanded. But if he does not deliver his declaration *four days* before the end of the term, or before the *esocign-day* of the *subsequent term*, defendant will be entitled to an imparlance. R. on R. M. 5 *Ann. Reg.* 3. a. *Gilb. K. B.* 346. When defendant is to plead.

All the other proceedings are exactly as in common cases, and when an inquiry is issued, or execution, you style him exactly as mentioned in the declaration.

N. B. Notice of trial or inquiry is the same as in other cases.

PROCEEDINGS AGAINST ATTORNIES.

For what an attorney may be sued for.

AN attorney has privilege to be sued only in the court where he is an attorney, *and by bill*; even as *acceptor of a bill of exchange*. *Doug.* 313, *Comerford v. Price*. If he is sued *by original*, he may plead his privilege, *ibid.* 313. and he ought also to sue in the same court. *1 Mod.* 118. If plaintiff and defendant are both attorneys *of the same court*, the proceeding is by bill, not by attachment to hold to bail. *Str.* 1141. *6 Term Rep.* 524. If sued as executor, &c. or *jointly with* others, he loses his privilege. *1 Vent.* 298. *Salk.* 544. He is not entitled to privilege in a foreign attachment, *8 Term Rep.* 417. His privilege only continues whilst practising, and whilst he has his certificate, *7 Term Rep.* 25, 26. Nor is he subject to the jurisdiction of the courts of conscience, except where he is *expressly* made liable thereto, as in *Westminster*, *25 Geo. 2. c. 42. s. 1.* *Tower Hamlets*, *19 Geo. 3. c. 68. 24 London*, *39 & 40 Geo. 3, c. 104.*

Attorney of C. B. arrested here, must put in bail, if of this court not.

In *Str.* 864, it is said, that an attorney of the C. B. arrested in this court, must put in bail, and plead his privilege. But if arrested in the *same court* wherein he is an attorney, he shall be discharged on common bail. *The Mayor of Basingstoke v. Bonner*, *1 Wils.* 306. S. P. See the *stat.* *12 Geo. 2. c. 13*, as to an attorney, who is a prisoner in any gaol not to sue out any writ in any court of law or equity, unless commenced before confinement. But he may defend, *Willes*, 288, and may sue out an attachment of privilege for a debt of his own. *7 Term Rep.* 671. *Kay, one, &c. v. Denew.*

Same point.

In *1 Wils.* 298. it is stated that an attorney of this court was arrested by latitat, and held by the whole court, that it is a motion of course to discharge him on filing common bail. *Wheeler's case*, or by summons.

If sued as executor.

An attorney sued as an executor, is not entitled to privilege, for he is sued in right of the testator, and not in his own right. *2 Lill. P. R.* 246. Nor if sued jointly with his wife or others. *Comb.* 6. *Salk.* 545. *Dyer* 377. (a)

A bill may now be filed against an attorney in the vacation, and he must pay costs.

It is settled, that an attorney of this court may be sued in the *vacation*, and he must pay the costs; and the court have said, that it will be putting attorneys in the same situation with all other defendants who may be sued in

vacation. *Waghorne v. Fields*, 5 Term Rep. 173. E. T. 33 Geo. 3. See *Dougl.* 313. S. P.

The solicitor under a commission of bankrupt is not in the first instance liable to the messenger whom he nominates for his bill of fees; but if the solicitor agree with the petitioning creditor, to work a commission for a certain sum, and receive a great part of that sum, he will be liable to such messenger. *Hartop v. Jukes*, 2 Maule and Selw. 438.

As to attorney's liability to messenger for fees.

The plaintiff filed a bill against defendant, an attorney, of M. T. 1792, as acceptor of a bill drawn 10th Sept. 1792, at three months; defendant demurred, and assigned for cause that the bill appeared to be exhibited in, and was entitled of *Michaelmas* term: whereas the cause of action appeared to have accrued on a day subsequent to said term. The cause of action did not accrue till the 13th of Dec. The court gave plaintiff leave to amend the bill (on payment of costs) as follows:—*Michaelmas* term, &c. Be it remembered, that on the 14th day of December (the day after the cause of action accrued) *A. Dodsworth* brought into the office of the clerk of the declarations of this court, according to the course and practice of the same court, his certain bill against *W. B. gent. one*, &c. and filed the same bill as of *Michaelmas* term, in the 33d year of the reign, &c. which said bill follows in these words, &c. *Dodsworth v. Bowen*, 5 Term Rep. 325.

If filed in vacation, the day of filing it may be inserted in the memorandum.

How to proceed.

The first step taken is, to prepare a bill against him, which is a complaint in writing, describing him as being present in court, 1 Saund. 28. and concludes with a prayer of relief, or it may be brings his suit, *Andrews* 247. (which is engrossed on 4d. stamp parchment,) and make a copy on 4d. stamp paper, file the bill with the clerk of the declarations in the King's Bench office, with a memorandum or minute on a 5s. stamp, then deliver the copy or leave it at his house, with notice to plead thereto in four days (which notice has been deemed sufficient, though he resides more than twenty miles from London, 5 Term Rep. 369. *Mann v. Fletcher*, one, &c.; attornies being by a fiction of law, always present in court,) provided the bill be filed four days exclusive before the end of the term. But if the bill be not filed, and a copy delivered within that time, the defendant is entitled to an imparlance, and then he is to plead within the first four days

of the next term. *Vide N. on R. E. 5 Ann.* A copy of the bill being left with the *known agent* to an attorney, is a sufficient delivery if he will accept it, but he is not bound so to do. Per Cur. *E. 39 Geo. 3.*

It is a hard case upon attornies who reside at great distances to plead in four days. In the other courts the attornies are put upon a footing with other persons to plead in eight days, if the residence be above twenty miles from *London*; and I hope to see a new rule upon this point of practice, as it has been much complained of, especially as country attornies are frequently absent on business from their places of abode.

If the name of defendant be not entered in the master's book, &c. how to proceed.

It is said that if the place of abode of the defendant be not entered in the master's book kept in the office; although his name and place of abode be entered in the book, containing a list of certificates, a copy of the bill may be stuck up in the office. — *v. Hough, one, &c. T. 42 Geo. 3. cited Tidd, 6 Ed. 313.*

Bill must be first filed.

The bill must first be actually filed before a copy is delivered, *Constable v. Edwards, E. 40 Geo. 3, ibid.* or it will be irregular. I find in a note of mine that a summons in 1787, was taken out for an agent to shew cause why he should not accept a copy of a bill against his client, and the judge said he was not bound to accept it.

The bill.

Easter term, in the 57th year of the reign of king George the third.
Law and Markham.

Middlesex, (ss) A. B. complains of C. D. gentleman, one of the attornies of the court of our lord the king, before the king himself, present here in court, in his own proper person; for that whereas (as in other cases,) "and therefore he prays relief, &c." add pledges to prosecute.

I. K. Attorney for the plaintiff.

Defendant in person.

How to indorse the bill.

Indorse on your copy to be delivered to the defendant thus, *This is a true copy of a bill filed against you, as of this present Trinity term, and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default.* Charge nothing for the copy, as he is not bound to pay for it.

With whom to be filed.

The bill is filed with the clerk of the declarations, pay 4d. if same term, but 8d. if of a preceding term, give a rule to plead, and demand a plea as in common cases; and if defendant does not plead, sign judgment, and ex-

ecute a writ of inquiry, as in other cases. A demand of plea is necessary. The time for notice of trial or inquiry is the same as in other cases.

If he pleads, make up the issue with a memorandum as in other cases.

If an attorney be arrested in an *inferior court*, he may have a writ of privilege to release him. 2 *Black. Rep.* 1085.

When he may have a writ of privilege.

A copy of a bill filed against an attorney partly printed and partly written on one sheet of paper, stamped with a four-penny stamp, which contained several printed counts, with two of them struck out, and was otherwise obliterated, and exceeded seventeen common law folios, was held to be irregular, as not being a copy written in the usual and accustomed manner, on which the duty of 4d. per sheet is imposed by stat. 48 *Geo.* 3. c. 149. And it appearing that the bill was framed in the same way with obliterations, the court also set that aside as being contrary to the practice of the court. *Hartop v. Jukes*, 1 *Maule and Selw.* 709.

If bill filed against an attorney, containing in one sheet more than 17 common law folios.

But before he signs the writ, a certificate must be obtained from the master's clerk, Mr. Boyle, of his being an attorney (or of the clerk of the warrants in *C. P.* if he is an attorney of that court); pay nothing for signing, seal 7d. take it to the clerk of the papers of the inferior court, who will get the judge to allow it, and order defendant to be discharged out of custody.

How to obtain same.

George, &c. To the judges of our court of our palace of *Westminster*, and to every of them greeting: whereas according to the custom of our court before us at *Westminster*, hitherto used and approved of in the same, the *attornies* of the same court before us, whilst they are prosecuting or defending suits and actions therein for their clients, ought not, nor have they from time immemorial, been used to be compelled to answer before any of our justices or officers, or other secular judges whatsoever upon any plea or pleas, complaints or demands, which do not particularly relate to us, (pleas of freehold, felonies, and appeals excepted,) save only before us, by bill exhibited in our said court before us, and not by writ, according to the same for times past used. And whereas we have lately received information by the complaint of *C. D.* gentleman, one of the *attornies* of our said court before us, that several ill-disposed persons, intending to disquiet the said *C. D.* have issued forth and prosecuted out

Writ of privilege.

To be engrossed on a 5s. stamp parchment.

See 9 *East*, 424.

Stokes v. Mason, as to this plea.

of our court of our palace at *Westminster*, one or more writ or writs, returnable before you in the same court, or one or more precept or precepts, returnable in our said court before you, or one of you, against the said C. D. and threaten to arrest and detain him in your custody thereupon, in suits that do not relate to us, or pleas of freehold, felonies, or appeals, whereby the said C. D. is unable to attend his said office as an attorney, upon several affairs and suits depending in our said court before us, which, if it be permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court before us, and the liberties and privileges thereof, but also to the great detriment of the said C. D. and his clients. And because we are willing that the jurisdictions, privileges, and customs, for so long time used and approved of in our said court before us, should be inviolably kept and observed, we command you, and every of you, that you wholly desist from taking the said C. D. into your custody, upon any writ or writs, precept or precepts; and if the said C. D. be detained in your custody by any writ or writs, precept or precepts, other than such as particularly relate to us, (pleas of freehold, felonies and appeals only excepted,) that then you discharge the said C. D. out of your custody, and suffer him to go at large, as you will answer the contrary at your peril, and that you inform the party or parties, plaintiff or plaintiffs, in the said writ or writs, precept or precepts, named, that he, she, or they, may prosecute his, her, or their action or actions, suit or suits, in our court before us, by bill to be exhibited to us, in our said court before us at *Westminster* against the said C. D. if he, she, or they, shall think it expedient so to do. Witness, *Edward Lord Ellenborough, &c. Law and Markham.*

This writ will serve to any inferior court except in its direction: it must be *directed right*, or need not be obeyed. *Vide title Habeas Corpus.*

Exempt from personal offices, but not militia.

Attornies are exempt from all offices requiring *personal* service, as *sheriff*, *constable*, *overseer* of the poor, &c. 4 *Burr.* 2109. *Dougl.* 538. 2 *Black.* 1126, but he is liable to serve in the *militia*, 2 *Black. Rep.* 1123—which he may do by substitute. (a)

(a) These privileges are allowed, for the benefit of their clients. 4 *Burr.* 2113. *Dougl.* 381. 2 *Wils.* 44. and confined to those who have practised within a year.

If a bill filed against an attorney in vacation, be intituled of the preceding term, and the defendant plead the statute of limitations, he may shew when it was in fact filed in his replication. *Peake's Cases* N. P. 209. *Snell v. Philips*, one, &c. See 7 *Term Rep.* 474. as to the amendment of a bill against an attorney being intituled of the term *before* the cause of action accrued after error brought. *Dickenson v. Plaisted*.

What may be shewed in replication to a plea of stat. As to an amendment of bill after error.

How to tax their Bills.

No attorney of this court shall commence any action for the recovery of any fees, charges, or disbursements, until one month after he shall have delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode, a bill of such fees, charges, and disbursements, in a common legible hand, and in the *English* tongue (except law terms and the names of writs,) and in words at length (except times and sums,) subscribed with the proper hand of such attorney. And upon application by the party chargeable by such bill, or of any other in that behalf authorized, *unto any judge of the court, &c. where the business, or the greatest part thereof in amount or value, was transacted*, and upon submission of the party, or other person authorised as aforesaid, to pay the whole that upon taxation shall appear due to such attorney, the judge, &c. is required and empowered to refer the bill, and the whole of such demands thereupon (although no action be depending touching the same,) to be taxed without any money being brought into court. And if the attorney, having due notice, shall refuse to attend such taxation, the officer may proceed *ex parte* (pending which reference no action shall be brought), and upon such taxation the party shall forthwith pay to the attorney the whole that shall be found due, and in default be liable to an attachment, or process of contempt, or other proceeding, at the election of the attorney. And if upon such taxation it shall be found that such attorney has been overpaid, then the attorney shall forthwith pay to the party all such money as the officer shall certify to have been so overpaid; and in default, shall in like manner be liable to attachment, or process of contempt, or other proceeding, at the election of the party. And the

When they may commence an action for fees. See 2 *Bos. & P.* 243. as to leaving their bill.

Judges to refer them to be taxed.

If it appears he has been overpaid, &c.

1 *Lill. P. R.* 142. *R. M.* 1654. and must have taken his certificate. 7 *Term Rep.* 25.

If less than a sixth to pay costs ;

if not less the client to pay.

Not to extend to any bill of fees between one solicitor and another.

Abbreviations.

There must be a cause in court.

Method to oblige an attorney to deliver his bill.

court is to award costs of such taxation, according to the event thereof, viz. if the bill taxed be less by a *sixth part* than the bill delivered, the attorney is to *pay the costs* ; if not *less* by a *sixth part*, the court at discretion shall charge the attorney or client according to the reasonableness or unreasonableness of the bill. 2 Geo. 2. c. 23. s. 23.

Nothing in the said act contained shall extend to any bill of fees, charges and disbursements, due from any attorney or solicitor to any other attorney or solicitor, or clerk in court ; but that every such attorney, solicitor, or clerk in court, may use such remedy for recovering of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making the said act. 12 Geo. 2. c. 13. s. 6.

A bill may be wrote with such abbreviations as are commonly used in the *English* language. Ibid. sect. 5.

No rule ought to be made for referring an attorney's bill delivered to his client, unless there be *a cause* in court. 1 Salk. 332. 12 Mod. 251. 1 Salk. 89. (a)

If an attorney refuses to deliver a bill to his client signed, he may take out a summons for that purpose before a judge ; and if he does not on service attend thereon, an order will be made to deliver it within a reasonable time ; which if he neglects delivering, upon making such order a rule of court, serving same, and making affidavit thereof, the court will grant an attachment, on motion.

If the bill is delivered, then you may apply to a judge for a summons, to shew cause why it should not be referred to the master to be taxed, upon which an order will be made on the client's undertaking in the judge's book, " to pay the attorney what shall appear to be due to him upon such taxation ;" if the attorney does not attend, an order will be made of course ; you cannot have a summons to deliver, and tax a bill together.

Get the master's appointment on the order, serve copy

(a) If a *dedimus* is sued out it may be taxed. 1 New R. 266. C. P. So a bill for a criminal suit in the court of great sessions at Carmarthen. *Lloyd v. Maund*, T. 26 Geo. 3. *Tidd*. 315. If the bill is not paid, it may be taxed at any distance of time. *Tidd* 316. Contra if paid. *Dougl.* 199. *Sayer of Costs*, 323, 321.

thereof, and the master will proceed on the first appointment.

The bill of an attorney cannot be *taxed at the trial* of an action brought upon it, nor after verdict. If there has been an account settled between the attorney and his client, the bill shall never afterwards be taxed as of course: particular cases may be pointed out: the client may by affidavit shew, that the business charged was never performed, or that the charges are fraudulent; but if the business was really done, the delay of the defendant for more than *a month*, in objecting to the *quantum*, is an admission, that he thinks *that* reasonable. *Hooper v. Till, Dougl.* 199. *Williams v. Frith*, 198. S. P.

Bill cannot be taxed at the trial.

If an attorney delivers his bill, and after his death it is taxed, and above a sixth part struck off, yet his executors shall not pay costs. *Str.* 1056. *Weston v. Pool.*

An attorney cannot be changed by his client, without leave of the court, or order of a judge, on payment of his bill as taxed by the master. *Dougl.* 217. *Macpherson v. Rorison.*

Attorney cannot be changed without leave of court.

The new attorney must, at his peril, take notice of all subsisting rules in the cause. 7 *Mod.* 50. Lord *Mansfield.*

Of what new attorneys are to take notice.

Court held, that though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumstance is not necessary to enable him to set it off; that he must not produce it at the trial by surprise; but that it is sufficient in such case to deliver it time enough for the plaintiff to have it taxed before the trial. *Martin v. Winder*, cited in *Dougl.* 199. notes.

If an attorney means to set off, he must deliver bill in time so as it may be taxed.

A party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the statute, which delivery was made to the second attorney in the cause; held a sufficient delivery, so as to enable the first attorney to bring his action for the amount of his bill. *Vincent v. Staymaker*, 12 *East*, 372.

As to the delivery of a bill of first attorney to the second attorney.

A bill for conveyancing and parliamentary business, and also causes in this court, was held liable to taxation. So where fees paid to a proctor for business done in the ecclesiastical court, and made part of the bill, the whole bill was referred, and the master might tax that part. *Ibid.*

Conveyancing and parliamentary business.

If for conveyancing only.

If the whole bill is for *conveyancing*, it cannot be taxed. *Ibid.*

When an attorney cannot maintain an action for business done at quarter-sessions.

Action for business done at quarter-sessions by an attorney, question was, whether a bill ought to have been delivered signed; verdict for plaintiff subject to opinion of the court. *Ex parte Williams*, 4 Term Rep. 496, 124. was cited in favour of plaintiff. Lord Kenyon—There must be judgment of nonsuit; for upon inquiry it was found, to have been the practice of the court, to tax such bills for business done altogether at the sessions; and there was no reason for restraining the general words of the first part of 2 Geo. 2. c. 23. s. 23. which requires an attorney to deliver his bill *one month* before he commences any action for the recovery of the amount. *Rule for nonsuit abs. Clark v. Donovan*, 5 Term Rep. 694.

Executor.

An executor may bring an action for his testator's bill *without signing it*, *Cooke's Rep.* 58, but such bill may be referred to be taxed on the defendant's undertaking to pay. Mr. J. Aston, 1780. 1 Salk. 89. 2 Str. 1056.

But if for preparing a warrant of attorney the bill is taxable. *Sandom v. Bourn*, 4 Camp. N. P. Rep. 68.

If any part of bill be for business done in the court, may be taxed.

If any part of an attorney's bill be for business done in the court, the bill must be delivered a month before the action is brought, otherwise the plaintiff cannot recover. *Winter v. Payme*, 6 Term Rep. 645. An item of *drawing and engrossing an affidavit of debt, to hold to bail, paid swearing, &c.* within the taxation. *Ibid.* See *Attorney, Lien*, p. 8.

An attorney having delivered particulars of his demand (after action brought), containing amongst taxable items a charge for money paid, was allowed to recover for that item. No bill had been delivered pursuant to the 2 Geo. 2. c. 23. 11 *East*, 285. *Mowbray, one, &c. v. Fleming*.

PROCEEDINGS AGAINST PEERS.

2 Co. 52.

By the common law, peers of the realm of England, and peeresses, whether by birth or marriage, are constantly privileged from arrests in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear; which privilege is extended, by the act of union,

3 *Ann. c. 8. art. 23*, with *Scotland*, to Scotch peers and peeresses; and by the act of union with *Ireland*, 39 & 40 *Geo. 3. c. 67. art. 4.* to *Irish* peers and peeresses. And they are not liable to be attached for the nonpayment of money pursuant to an order of *nisi prius*, which has been made a rule of court. But this privilege will not exempt them from attachments for not obeying the process of the court. 1 *Burr.* 631. 1 *Wils.* 332. Nor does it extend to peeresses by marriage, if they afterwards marry with commoners. *Co. Litt.* 16. 2 *Inst.* 50.

They formerly have been sued by bill and summons under the stat. 12 & 13 *W. 3. c. 3. Comp.* 843. *Gosling v. Lord Weymouth*, *Say.* 63. But in a late case, *Littledale v. Lord Lonsdale*, 2 *H. Bl.* 267, 299. it was the opinion of the judges, on a question referred to them in the House of Lords, that these cases were not to be considered as decisive authorities on the subject: though after pleading in chief it was too late for the defendant to object to the jurisdiction of the court. Therefore, the regular mode of proceeding against a peer is by original writ. And where an action is brought against a peer jointly with others, the original writ should be against all the defendants, upon which the peer should be summoned, and a special *capias* issued against the other defendants.

Formerly the plaintiff could not proceed against peers or members whilst sitting in parliament; therefore, to prevent delaying the king's subjects, the statute 10 *Geo. 3. c. 50.* enacts, that any person shall and may commence and prosecute any action or suit in any court of record, or court of equity, or of admiralty, and in all causes matrimonial or testamentary, against any peer or lord of parliament of *Great Britain*, or against any of the knights, citizens, and burgesses, of the house of commons of *Great Britain*, for the time being, or against their or either of their menial servants, or any other person entitled to the privilege of parliament: and no suit, action, &c. shall be staid by or under colour or pretence of any privilege of parliament, provided that nothing shall extend to subject the person of any of the knights, citizens, and burgesses, or the commissioners of shires and burghs of house of commons of *Great Britain* for the time being to be arrested or imprisoned, upon any suit or proceedings. s. 2.

Suits may be prosecuted against peers and members.

Or against their servants.

The servants of peers necessarily employed about their persons and estates could not formerly have been arrested. 2 *Str.* 1065. *Ord. Dom. Proc.* 28 June 1715. Yet this privilege seems to have been taken away by the above statute. 5 *T. R.* 687.

This act takes away the privilege of servants of peers.

How to proceed by Original. (a)

Officer's fee
10s.

If no appear-
ance entered.

Prepare a *præcipe* for the cursitor of the county (b), who makes out the original, take a memorandum on a 5s. stamp or warrant, and annex thereto, pay fine to the king, and for the original writ, when sealed; take it to the sheriff, who will make out a summons thereon, pay 2s. 6d. deliver it to your officer, who will leave the summons at defendant's house. After he has summoned defendant, get the *original summons* returned by the officer and delivered into the sheriff's office. Then get sheriff to return the writ, pay 2s. If the defendant does not enter his appearance within *four days after the quarto die post* of the return with the filacer, he will make out a *distringas* thereon, and sign same, (or you make it out yourself) pay according to length, seal 7d. get a warrant thereon at sheriff's office, pay 2s. 6d. give it to your officer, who will levy 40s. 4 *East*, 162. If no appearance be entered on the *quarto die post* of the return, then get the writ returned by the sheriff, take it to the filacer, and he will make out an *alias*, on which there must be a motion in court to increase the issues, which may be done on producing the return to the *first distringas*; fee to counsel 10s. 6d. Draw up the rule with the clerk of the rules, take same to the sheriff's office with the *alias*, and he will make out a warrant thereon for his bailiff to levy the amount ordered. If you have not obtained to the full amount of the debt and costs (which generally is given on the *alias*) you may proceed to get a return to the *alias* as before, and issue a *pluries*; move the court to increase issues to the full extent of the debt and costs incurred, which will now be granted: draw up the rule, and deliver it with the *pluries distringas* to the sheriff: he will make out a warrant to his bailiff to levy the amount. Then if no appearance is entered on the *quarto die post* of the

(a) If a peer be sued jointly with others by *bill of Middlesex*, the court will set aside the proceedings as against the peer. *Brisco, bart. v. the Earl of Egremont, and others*, 3 *Maule and Selw.* 88.

(b) If the peer does not reside in the county where the *venue is laid*, you may have a writ of *testatum summons* into the county *where he does reside*, by having first obtained a return on the original to whom it is directed of

return, proceed by getting a return thereto; and move the court (in pursuance of the statute 10 Geo. 3. c. 50. s. 3. which enacts, that the court may order the issues levied to be sold, and the monies applied to pay such costs to the plaintiff as the court shall think just, and the surplus be retained until the defendant shall have appeared, or other purpose of the writ be answered: with this proviso, when the purpose is answered, then the issues shall be returned, or if sold, what shall remain of the money arising by such sale, shall be allowed to the party distrained on,) for a rule to shew cause why the issues returned upon the several writs of *distringas* should not be sold, and the monies arising from the sale thereof, should not be forthwith brought into court, and why it should not be referred to the master to tax the plaintiff his costs occasioned by his issuing out the said several writs; and why the costs, when taxed, should not be paid out of the monies so brought into court; and why the surplus of the said money, after payment of the said costs, should not be retained in court, until the purpose of the said writs is answered; fee to counsel, 10s. 6d. This is moved upon an affidavit of the several writs of *distringas* having issued, and the sheriff's returns thereto, and that defendant hath not appeared: draw up rule, serve copy on sheriff, *shew the original rule*, move the court of an affidavit of the service and *shewing the original rule*, and to make it absolute: draw up rule, serve copy on the sheriff, *shew the original*, and if he does not bring the money into court, he will be liable to an attachment. Make out bill of costs, and tax them with the master. If defendant still holds out, and does not appear, you may *distrain him ad infinitum*, until he does enter his appearance, and you may move to sell the issues from time to time, as the act directs.

In *Raban v. Plaistow*, the court held, that the stat. 10 Geo. 3. extended to all writs of *distringas*, are not confined to such as concern privilege only; and ordered the issues to be sold, and the costs incurred to be taxed, and paid to the plaintiff, out of the money arising thereby, and the residue to be retained, in order to answer the event of the suit. 5 Burr. 2726. This was against the late sheriff.

Middlesex (ss) If A. B. makes you secure, &c. then put, &c. John Earl of B. (having privilege of parliament) that he be before us on wheresoever, &c. to shew, for that *whereas* (here set forth the whole count or declaration) to the damage of the said A. B. of 500l. as it is said, &c.

Sect. 4.

Rule.

Distrain ad infinitum.

To what it extends.

Præcipe for original.

Distringas thereon. To be ingrossed on a 5s. stamp parchment.

George the third, &c. To the sheriff of *Middlesex*, greeting: we command you, that you distrain *John Earl of B.* having privilege of parliament, by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that he be before us on _____ wheresoever we shall then be in England (*a*), to answer A. B. in a plea (to the end of the *præcipe*), to the damage of the said A. of 500l. and to hear his judgment thereupon of many defaults; and have you there this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the _____ day of _____ in the 57th year of our reign.

Filazer makes out summons and distringas.

The filazer always makes out the writ of *summons*, and *distringas*, stating the cause of action at large, namely, the whole of the *præcipe*, *Trye*, 127. and they must be made returnable on a general return day, wheresoever the king shall then be in *England*. Each succeeding writ must be tested on the *quarto die post* of the return of the preceding one; and there must be fifteen days at least between the teste and return.

N. B. I do not see the necessity of stating the whole cause of action at large in a summons, or distringas, as the sheriff's warrant is very shortly stated. The old entries are short; and the filazer may still charge the legal fee for signing the writs. The distringas being a process of contempt, I do not see any reason why that writ should not be made returnable on a day certain in court, instead of a general return, and the teste of it any day in the term preceding the issuing it. Its being made returnable on a general return day, and fifteen days between the teste and return, is a great delay to the plaintiff in his suit. In the Common Pleas the distringasses are made on a day certain, and need not have fifteen days between the teste and return; the writ is only a compulsive process to compel the defendant to appear.

(a) And if the sheriff return on the summons nihil you may have a testatum distringas into another county without any new writ of summons in such county. 4 *East*, 162. See *Com. Dig. Process, Distringas, D. 7*.

Appearance.

The defendant is to appear in four days after the *quarto die post* of the first *distringas*, if it is returnable the first return of the term, and to an *alias* or other *distringas* on the *quarto die post*. When the defendant is to appear.

He enters it with the filazer, by delivering it on paper thus: With whom to enter it.

“ *Middlesex, appearance for John Earl of B. at the suit of A. B. to a writ of *distringas*, returnable on — where-soever, &c. (or *alias*, or *pluries*.) J. K. attorney.* ” Appearance. The return day.

Pay for entering 2s. 6d. and deliver a memorandum or warrant to defend, on a 5s. stamp, and if the 40s. have been levied, call on the officer for it, and he must return same, or get a certificate from the filacer of defendant's appearance, produce it to the officer; if he will not pay, the judge will compel him by order upon a summons for that purpose.

The plaintiff in an action against a member, had proceeded agreeable to 10 Geo. 3. and obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*; and also for a rule for an attachment against the sheriff, but no issues had been actually levied; at length defendant appeared; whereupon it was moved that these rules should be discharged; for as no issues had been levied they could not be sold, and as the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side, the plaintiff insisted on the costs of issuing the writs, before the rules should be discharged. And the court thought that reasonable, and directed that on payment of costs the rules should be discharged. They were of opinion that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed or not. 5 Burr. 2725. *Martin v. Townsend & an.* If the defendant appear after levy on *distringas*, he shall pay the costs before he has the money returned.

*Middlesex (ss) John Earl of B. was summoned, to answer A. B. in a plea of trespass on the case, and thereupon the said A. B. by J. B. his attorney, complains that whereas, (to the end of the *præcipe*, but both in the *præcipe* and *declaration* leave out these words) “but contriving, &c. to deceive and defraud the said A. B. in this behalf;” for the lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit. 2 Crompt. 149.* The declaration.

When to plead.

If the declaration be delivered four days before the end of the term, the peer must plead if he lives within twenty miles of *London*, in four days: country, eight days. And, if he be in contempt, and afterwards enter his appearance, he is not entitled to an imparlance.

When a peer is not entitled to an imparlance on an essoign cast.

All the subsequent proceedings are the same as in other cases, only he cannot be taken in execution.

Summons.

George the third, &c. to the sheriff of greeting:
we command you that you cause to be summoned *John*
Earl of B. (having privilege of parliament) that he be be-
fore us on wheresoever we shall then be in *Eng-*
land, to answer A. B. of a For that whereas (to the
end of the præcipe) to the damage of the said A. B.
of l. as he shall be able reasonably to shew that there-
of he ought to answer, and have there this writ. Witness
Edward Lord Ellenborough, at *Westminster,* the
day of in the 57th year of our reign.

**Testatum
summons.**

If it be a testatum summons, go as far as the word (answer) then as follows:

And whereupon our sheriff of at a certain day now past, returned to us at *Westminster*, that the said *John* Earl of B. had nothing in his bailiwick, by which he could be summoned: whereas it is testified in our said court before us, that the said *John* Earl of B. may be summoned in your bailiwick: and have there then this writ. Witness, &c.

The form of a testatum distringas you will see in proceedings against members of parliament.

It should be remembered that no *capias* lies against a peer or member of parliament; therefore neither can be taken by a *ca. sa.*, unless where the judgment is obtained upon a statute staple, or statute merchant, or upon the statute of *Acton Burnel*, 11 *Ed. 1.* in which case a *capias* lies even against peers of the realm.

A writ of *latitat* was issued against *Henry Lord Arundel*, Baron of *Wardour*, &c. who appeared on a motion (grounded on an office copy of the *præcipe* filed on issuing the writ,) why the writ should not be superseded and the proceeding staid. The rule was made absolute. *Couche v. Lord Arundel*, 3 *East*, 127. See 1 *Vent.* 298. *Countess of Huntingdon's case*.

A *latitat* against a peer was superseded, though he had appeared to the writ.

The lords temporal consist of all the peers of the realm, (the bishops not being in strictness held to be such, but merely lords of parliament,) by whatever title of nobility distinguished; dukes, marquisses, earls, viscounts, or barons, 1 *Black. Com.* 157. And the names of dignities of the nobility are parcel of their names, and so ought to be named in the king's writ. 4 *Inst.* 363. But the offices of chancellor, treasurer and other offices are not parcel of their names, and therefore need not be so named in writs. *Ibid.*

Lords temporal.

Proceedings against Members of Parliament. (a)

You may either proceed against them by original, or by bill; if by original, it is the same as against a peer; but if by bill, prepare a bill against him, and ingross it on a 4d. stamp parchment, file it with the clerk of the declarations; if it is in vacation, and you want to sue him, you must file the bill, and entitle it as of the preceding term. A warrant on a 5s. stamp is to be filed with the bill.

How to proceed against them.

Middlesex, to wit. A. B. complains of C. D. esq. The bill. (having privilege of parliament) of a plea of trespass on the case; for that whereas, &c. as in other declarations, except in the conclusion, there leave out the

(a) This mode of proceeding is not allowed as against unprivileged persons. *Whitworth v. Richardson*, E. 23 *Geo. 3.* cited, *Tidd*, 6 *Ed.* 114.

Pray process. words "*contriving and fraudulently, &c.*" and therefore he brings his suit, &c. And hereupon the said A. B. prays the process of our lord the king, according to the form of the statute in such case made and provided, to him thereon to be made; and to him thereon it is granted, &c. Pledges, &c.

As soon as the bill is filed, issue out the writ of summons, which is to be engrossed on a 5s. stamp parchment, signed by Messrs. *Provost and Chambre*, pay 1s. 8d. and 7d. seal, sheriff for his summons 5s. officer for service 5s. (a)

Cannot levy more on testatum distringas than 40s. in the first instance, without a rule of court, which cannot be obtained being like a first distringas.

A summons was issued in *London*, where the action was brought, and where the member did not reside, and a *nihil* and *non est inventus* was returned by the sheriff. A *distringas* was issued in same county, to which there was a *nulla bona* returned. Then a *testatum distringas* was issued into *Northumberland*, and the sheriff took possession of property to the amount of 12 000l. in the first instance, without a rule to increase the issues. On motion to set aside these proceedings for irregularity, the court ordered that so much of the rule as related to the setting the writs aside should be discharged; and upon payment of 40s. the goods seized be forthwith restored. *Bloxham, Knt. & al. v. Surtees & al.* 4 East, 162.

Writ of summons.

George the third, &c. To the sheriff of *Middlesex* greeting: we command you, that you cause to be summoned C. D. esq. (having privilege of parliament) that he be before us at *Westminster* on next after

(b) As the action is.

to the damage of the said A. B. of l. to answer A. B. of a plea of trespass on the case (b), to the damage of the said A. B. of l. as he shall be able reasonably to shew, that thereof he ought to answer; and have there then this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign.

Law and Markham

Præcipe for summons.

Middlesex. Writ of summons for A. B. against C. D. esq. (having privilege of parliament), returnable on next after J. K. attorney.

(a) A *testatum* summons may issue into another county, on a *nihil* being returned on the summons 4 Com. Dig. title *Process, Distringas*, D. 7.

This writ, as proceedings are by bill, need not have fifteen days between the teste and return, nor need the *distringas*.

If defendant does not appear *within four days after* If no appear-
the writ is returnable, and the sheriff having returned anca.
him summoned, sue out the following *distringas*, which
is engrossed on a 5s. stamp parchment, signed by Messrs.
Provost and Chambre, pay 1s. 8d. seal 7d. warrant 2s.
6d. officer for the levy 10s. or you may proceed under
the statute of 45 Geo. 3. c. 124. sect. 3. which enacts,
that when any summons, or original bill and summons,
shall be sued out against any person having privilege
of parliament, and no such affidavit shall be made and
filed, as in the act of 4 Geo. 3. c. 33. is mentioned, if
the defendant shall not appear at the return of the
summons, or within eight days after such return, in
every such case, it shall be lawful for the plaintiff, upon
affidavit being made and filed in the proper court of the
personal service of such summons, to enter an appear-
ance for the defendant, and to proceed thereon, as if such
defendant had entered his appearance.

George, &c. To the sheriff of *Middlesex*, greeting: *Distringas*.
we command you, that you distrain C. D. esquire
(having privilege of parliament), by all his lands and
chattels in your bailiwick, so that neither he, nor any
one for him, do intermeddle therewith, until you shall
have another command from us in that behalf; and that
you answer to us for the issues of the same, so that
he be before us at *Westminster*, on next after
, to answer A. B. in a plea of trespass on
the case upon promises, to the said A. B. his damage
of 50l. and to hear his judgment thereupon of many
defaults; and have there then this writ. Witness, &c.

Law and Markham.

Middlesex. Distringas for A. B. against C. D. esq. *Præcipe*.
(having privilege of parliament,) case, returnable on,
&c.

J. K. attorney.

If the defendant does not appear on the return day *Alias*.
of the *distringas*, then get a return from the sheriff,
and issue an *alias*, and proceed as against peers to increase
the issues. The *alias* states, we command you, as before we
have commanded you, that you distrain. If there be a
pluries, say, as oftentimes we have commanded you.

The motion to increase the issues, or sell them, may
be made on the last day of the term.

File common
bail.

But if defendant appears, he files common bail, and also a memorandum or warrant on a 5s. stamp, with the clerk of the common bails.

When to issue
a testatum
distringas.
Vide Try's
Jus. Fil.

If he has no goods whereby he can be distrained in the county where the *venue* is laid, get a *nihil* returned on the first *distringas*, and issue a testatum into the county where you intend to levy; go on in the former writ as far as "50l." then say, and for that our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said C. D. had not any thing in his bailiwick whereby he could cause him to be distrained, as by the said writ he was commanded, whereas it is testified in our same court before us, that the said C. D. hath sufficient lands and chattels in your bailiwick by which he may be distrained; and have there then this writ. Witness, &c.

Appearance
and declara-
tion.

When defendant has appeared, deliver him a declaration as of the term the appearance is of, and if delivered four days exclusive before the end of the term, he must plead without imparlance. The declaration is engrossed on a 4d. stamp paper, and is nothing more than a copy of the bill, only go as far as "suit, &c." and add pledges; give a rule to plead as in other cases. He has the same time to plead as other persons: in town, or within twenty miles, four days; country, and above twenty miles, eight days.

Præcipe for
original.

Middlesex (ss) If A. B. makes you secure, &c. then put, &c. *Henry George*, late of *Westminster*, in the said county, esquire, (having privilege of parliament,) that he be before us on _____ wheresoever, &c. to shew, *For that whereas.*

The other proceedings are the same as against peers, by original.

If a member
be in K. B.
prison how to
proceed,

The defendant, a member, being in K. B. prison, under a sentence on a criminal information, the plaintiffs filed a bill against him as being in custody of the marshal, but issued no summons. *Rule to set aside proceedings for irregularity. Per Cur.*—In ordinary proceedings against a person having privilege, a summons is issued for the purpose of bringing him into court; but that is perfectly unnecessary, where such a defendant is already in the custody of the marshal: in such a case, the plaintiffs may file a declaration against him, as being in the custody of the marshal, though they could not charge him in custody in a bailable action. *Rule discharged. Jackson & al. v. Mackreth, 5 Term Rep. 361.*

CORPORATIONS.

CORPORATIONS aggregate, consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are a mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church.

Where a corporation is plaintiff in a civil action, leave to inspect their books is granted to the defendant, of course. *The Mayor of Lynn v. Denton*, 1 Term Rep. 689.

Corporations sole, consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation; so is a bishop; so are some deans and prebendaries, distinct from their several chapters; and so is every parson and vicar. *Co. Lit.* 43.

When a corporation is erected, a name must be given it; and by that name alone it must sue, and be sued, and do all legal acts; though a very minute variation therein is not very material. 10 Rep. 33. A corporation aggregate must always appear by attorney, 10 Rep. 32. It cannot be outlawed. 10 Co. 32. b. The proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods. *Bro. Abr.* 11. 72. It must be sued by original writ: for it cannot be declared against as in the custody of the marshal. 6 Mod. 183.

When corporations erected, must have a name, &c.

The proper process against them is a *distringas*, *Process. Raym.* 152. And upon a *distringas* issuing the court will compel the sheriff to return good issues. *Salk.* 191. pl. 2. Care must be taken, in stating their name of incorporation.

How to proceed.

An original writ, is the only ground of proceeding against a corporation. *Try.* 11. For the service, see *Sty. Rep.* 367. 1 Vent. 351.

Draw a *præcipe* for the original, take it to the cursitor, who will make out and seal it, then get a summons thereon from the sheriff of the county, directed to his officer, who may leave same with their town-clerk, who will undertake for their appearance; if not, I should apprehend leaving the summons with the *mayor* or other head officer will be sufficient; and if no appearance entered in due time, issue out a *distringas*, and an *alias*, &c. same as against peers.

May distrain the land or goods of corporation.

The sheriff may distrain the lands and goods which constitute the common stock of the corporation. *Skin.* 27. If they have neither lands nor goods, there is no way to compel them to appear. (a) *Skin.* 85. *Vide* 3 *Salk.* 104. See 1 *Chan. Cas.* 204.

If they sue, it must be by attorney.

If they sue, they must sue in the name of the corporation, by an attorney appointed under the seal of the corporation, and the members cannot be witnesses for the corporation, 2 *Lev.* 232, 236. *Str.* 1069; but they may disfranchise one for that purpose. They may sue in common form by *latitat*, &c.

In ejectment the plaintiff declared on a demise made by a corporation, and did not set it forth by deed, or under the common seal, held good.

In ejectment in the common bench, the plaintiff declared upon a demise to him by the aldermen and burgesses of *Bury St. Edmund*, in the county of *Suffolk*, and did not set forth that it was by deed, or under seal of the corporation: upon not guilty pleaded, plaintiff had a verdict and judgment; and error was brought in K. B. and the error insisted on was, that this demise was void, because a corporation aggregate can do nothing but by deed under their common seal; and 2 *Cro.* 613. was cited as parallel. *Sed per Cur.* Since that case the law is altered as to this point concerning declarations in ejectment, for now they are grounded on fictions only. Judgment affirmed. *Patrick* against *Ball*, *Carth.* 390. 12 *Mod.* 113.

Essoign.

A corporation is not entitled to an essoign. *Argent v. Dean and Chapter of St. Paul's*, E. 23 *Geo.* 3. 2 *Term Rep.* 16.

Must appear by attorney.

A corporation aggregate must appear by an attorney appointed under their common seal, for they cannot appear in person. 13 *Ed.* 1. c. 10. 2 *Inst.* 376. *Gillb. C.* P. 32.

(a) For it is a rule, that for a public concern, the sheriff cannot distrain any private person, who is a member of the corporation. 1 *Vent.* 351. *Cowp.* 85.

HUNDREDORS.

IF an action be commenced on the statute of hue and cry, the plaintiff must take out his special *original writ*; for the inhabitants of a hundred cannot be in custody of the marshal: nor are they liable to a *capias*. *Bro. 43.* The only method to proceed against them is by *summons* on the original, and *distress infinite*. *3 Keb. 126.* *2 Saund. 375.* *4 Mod. 296.* And the original usually recites the statute. *Ibid.* To be tested forty days after the robbery, otherwise it is error. *2 Lev. 12.* And within a year after the robbery. *1 Brownl. 156.* If several are robbed, they cannot join. *2 Lev. 12.*

How to sue the hundred.
Stat. 13 Ed. 1.
st. 2. c. 1, 2.
28 Ed. 3. c. 11.
27 El. c. 13.
22 Geo. 2.
c. 24.

The declaration must be against the hundred *generally*, and must shew the robbery to be *within the hundred*, and *upon the highway*; if not, it is good after verdict. *Carth. 71.* *1 Mod. 221.*

As to the declaration.

By the 8 Geo. 2. c. 16. It is enacted, that no person shall maintain any action against any hundred, by virtue of the *stat. 13 Ed. 1. st. 2.* and *27 El. c. 13.* unless he shall over and *besides* the *notice required by the stat. 27 Eliz. c. 13.* give notice thereof to one of the constables of the hundred, or to some constable, &c. of some town, &c. wherein such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c. describing in such notice, so far as the nature and circumstances of the case will admit, the felon and felons, and the time and place of the robbery: and also shall, within *twenty days* next after the robbery committed, cause public notice to be given in the *London Gazette*, describing as aforesaid, together with the goods and effects whereof he was robbed; and before any action commenced, go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or their deputies, or before the sheriff, and enter into a bond, to the high constable, &c. of the hundred in which such robbery shall be committed, in 100*l.* with two sureties, &c. with condition for securing to such high constable, &c. (who are empowered to enter an appearance, and defend such action,) the due payment of costs, after taxed in case he shall be nonsuited, or discontinue, or in case judgment

Vide stat.
13 Ed. 1. c. 1.
27 Eliz. c. 13.
No person to sue the hundred in case of robbery without notice to a constable.

Describing the case, and publishing it in the Gazette.

And before action give security to, &c.

shall be given on demurrer, or a verdict given against him.

The sheriff to certify such bond; and certificate to be delivered to the chief clerk before process.

Action when to be brought.

2. That when any such bond shall be entered into, the sheriff shall certify same to the chief clerk, &c. which certificate shall be delivered by the party robbed to the chief clerk, &c. *before any process shall issue for the commencement of such suit as aforesaid.*

The action must be brought within the year next after such robbery, *21 El. c. 13. s. 9*; the day when the robbery is committed is included in the year, *1 Brownl. 156. Hbb. 139. Roll. Abr. 520. pl. 8*; and the inhabitants within the hundred may be witnesses. *8 Geo. 2. c. 16. s. 15.*

How to proceed.

High constable only to be served with the process, who is to give public notice thereof the next market day.

Prepare a *præcipe* for the original, take it to the cor-
sitor of the county where the venue is laid, and a memo-
randum on a 5s. stamp, pay fine to the king, and for
original: when sealed make a copy thereof, which for-
merly used to be served on some inhabitant of the hun-
dred. But by *8 Geo. 2. c. 16. s. 4.* it is to be served on
the high constable, &c. of the hundred wherein the rob-
bery shall happen: who is to cause public notice to be
given in one of the principal market towns within such
hundred, on the next market day after he or they shall
be served with such process; or if there shall happen to
be no market town within the hundred, then in some
parish church within the same hundred, immediately
after divine service, on the Sunday next after his being
served, and enter an appearance, and defend for the
inhabitants, as advised.

If he do not appear.

If he do not appear in time, a distringas may be issued
and levied against all or any of the defendants, and you
may issue an alias and pluries, and sell the issues under
the stat. *10 Geo. 3.* as it is determined that the statute
extends to all writs of distringas. *Raban v. Plaister,*
5 Burr. 2726.

How to ap-
pear.

The defendant must enter appearance with the filier,
on the *quarto die post* of the return of the original. A
memorandum on a 5s. stamp is necessary.

The form of the declaration is in my *Modern Plead.*
85. with useful notes.

Ven. fac.

If the defendants plead, and there is an issue, the venue
facias, by *29 Geo. 2. c. 18. s. 3.* shall be awarded *de*

corpore comitatus (except the hundred against which the action is brought.)

If judgment be given against the hundred, the *stat.* of 8 Geo. 2. c. 16, enacts that the sheriff, &c. on receipt of the execution against any inhabitant, shall cause the same to be shewn gratis to two justices of the county, &c. (whereof one to be of the *quorum*,) who are to cause such taxation and assessment to be made, and to be levied according to the 27th *Eliz.* (viz. by the constables, &c. rateably and proportionably, &c.) in which taxation and assessment there shall be provided and included, over and above what the costs and damages recovered by the plaintiff in such action shall amount to, all such expences which the high constable hath been at, claim being made before the said justice upon due notice for that purpose given; and the money levied, to be paid over by such constable, &c. within ten days after collection, to the sheriff, to the use of the plaintiff, for his costs and damages, and to the use of the high constable, for so much as his expences in his defence shall amount to; of which he shall give an account, on oath, before any taxation; and shall have no further allowance than what shall be taxed, which the high constable shall cause to be taxed for that purpose. *s.* 4. The money paid over to the sheriff, shall (upon request) be by him paid over to the parties entitled, without deduction. *s.* 5. Sheriff not to be called on for return of writ until 60 days after writ delivered to him, who is to indorse on it the day received. *s.* 6.

If judgment be given against the hundred, the sheriff to shew the writ to two justices, who are to tax and levy the charges as by *stat.* 27 *El.* c. 13.

The money to be paid within ten days after collection to the sheriff, for the use of the plaintiff.

The 7th section provides in what manner the constable shall be reimbursed his expences, in case the plaintiff is nonsuited, &c. and becomes, or his sureties in the bond become, insolvent.

If persons, riotously assembled, in part demolish and pull down a dwelling-house, and at the same time destroy goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the hundred is liable, under *stat.* 1 Geo. 1. *st.* 2. c. 5. to yield damages for the destruction of the furniture as well as of the house, and costs. Riot.

The action is to be brought against two or more of the inhabitants of the hundred in which the damages were done: and upon this act it does not seem to be necessary to proceed by original writ, *Tidd*, 122.; contra upon the black act, 1 Geo. 1. *stat.* 2. c. 5. *s.* 6. which is to be

To be brought against two or more inhabitants of the hundred, &c. not necessary to proceed by original,

Execution
how regulat-
ed.

brought against the inhabitants of the hundred in the same manner as on the statute of hue and cry. And the execution is regulated by stat. 22 Geo. 2. c. 46. s. 34. see 5 *Term Rep.* 341, that the money must be levied on the inhabitants of the towns, parishes, villages, and hamlets pursuant to stat. 27 Eliz. c. 13. and not upon the inhabitants of the *districts* and *parishes* within the hundred. *Rex v. Inhabitants of Halfshire.*

PROCEEDINGS BY ORIGINAL WRIT.

Against whom
may be issued.

THE original writ is a mandatory letter from the king in chancery, sealed with his great seal, and may be the means of commencing all personal actions, against every person not being an attorney or officer of the court, or a prisoner in the actual custody of the marshal. 3 *Black. Com.* 273. It now may be issued against peers, members of parliament, corporations, or hundredors on the statutes of hue and cry, &c. and all other persons. The benefit of this proceeding is, that after judgment, a writ of error will not lie in the Exchequer chamber, but only in parliament, 2 *H. Black.* 304. 1 *Sid.* 424. *stat.* 27 *El.* c. 8. But in order to save the great expence of suing special writs in small suits, the stat. 5 Geo. 2. c. 27. s. 5. enacts that no special writ or process expressing the cause of action shall be sued out from any superior court, where the cause of action shall not amount to 10l. or upwards. 5 Geo. 2. c. 27. s. 5. 3 *Burr.* 1484.

No more costs
allowed in
process by
original, than
a common
writ, unless
the debt re-
covered be
50l.

And by rule it is ordered, That from and after the last day of this present Michaelmas term, in all actions in which the plaintiff shall proceed against the defendant by special original writ, and shall recover less than the sum of 50l. he shall not, on taxing costs, be allowed any more or other costs than he would be entitled to, in case he had proceeded by bill (except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed.) R. M. 23 Geo. 3.

Writs by ori-
ginal to be
signed before
sealed by the
filazer.

It is ordered, That original writs, which by law ought to be signed by the filazers of this court, shall be signed by the said filazers before such writs be sealed by the officer of this court. *Hil.* 31 Car. 2.

All writs by
original ought
to be signed

It is ordered, That all writs and processes whatsoever issuing upon original writs before the appearance of the

defendant, ought to be signed by ~~filazers~~ filazers of this court, before appearance, by the according to the course of this court. R. E. 31 Car. 2. filazer.

How to proceed.

If the defendant is to be arrested, prepare affidavit of the debt, engross it on a 2s. 6d. stamp paper, and it may be sworn either before a judge of this court or the (a) filazer then.

Prepare a præcipe, for the original writ, which is to contain the whole *count* or *declaration*, in which must be set forth the defendant's estate, degree, or mystery, and the town, or hamlet, or place, and county, where he is, or was conversant. In common assumpsit.

Middlesex (ss) If A. B. make you secure, &c. then put &c. J. D. late of *Westminster* in the said county, yeoman, that he be before us on the morrow of All Souls, where-soever, &c. to shew for that whereas (here set forth the whole count or declaration and conclude thus): To the said A. B. his damages of 69l. as issaid, &c. Præcipe for an original in assumpsit.

This is done on paper without a stamp, and taken to the filazer, who will make out the *special capias* thereon, to the sheriff of the county where defendant is to be met with. But mostly, for expedition sake, this is done by the attorney himself; pay him 5s. 4d. for the first count, and 1s. for every other; sealing 7d.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you take J. D. late of *Westminster*, in your county, yeoman, if he be found in your bailiwick, and him safely keep, so that you have his body before us on the morrow of All Souls, where-soever we shall then be in England, to answer A. B. in a plea, for that whereas, (to the end of the præcipe,) to the said A. B. his damage of 69l. as it is said; and have there this writ. Witness, *Edward Lord Ellenborough*, Special capias thereon.

There must be a memorandum or warrant on a 5s. stamp filed with the filazer.

(a) A special capias issued upon an affidavit sworn at the Bill of *Middlesex* Office, is irregular; but if the defendant be arrested upon it, and put in special bail, he thereby waives their regularity. *Dalton v. Barnes*, 1 *Maule and Selw.* 230.

PROCEEDING ORIGINAL
 at Westminster.
 of our reign. (14) the fil-
 K. L. attorney.
 Bail for 64l. by affidavit filed.

7th year

Kenyon.

As to the
 teste.

There are many notes in the old books respecting the teste of the original and *capias*; and there can be no doubt but that they both may be returnable the same day, (unless you proceed to an outlawry,) and that the teste of the *capias* may be the last day of the preceding term, (though the cause of action accrued in the vacation,) otherwise in a short vacation, an original could not be purchased; and every *capias*, alias, and *pluries*, must have fifteen days between the teste and return of each; and the morrow of the *Ascension* shall be a good return, notwithstanding there be not fifteen days between the fourth day of the said return, and the *essoign* day of the morrow of the *Holy Trinity*. 16 *Car. 1. c. 6. s. 7.*

As to teste.

The cursitor
 takes care
 of this.

The original writ may be tested in vacation, as well as in term time. *Sty. Rep. 402.* But on a *Sunday* or other *dies non juridicus*, it should, however, be always tested after the cause of action accrued, 2 *Burr. 967.*; and be made returnable in term time *ubicunque*, &c. if plaintiff means to proceed to outlawry.—If not, the *capias* may be tested before the original, and even before the cause of action accrued, provided it be actually taken out afterwards, for no error can be assigned on mesne process. 3 *Wils. 344.* The original must have fifteen days between the teste and return. (b)

Pay on original writs, where the damages exceed 40l. a fine to the king, in the following proportions.

	£	s.	d.
Fines to the king. From 40l. to 66l. 13s. 4d. i. e. 100 marks	0	6	8
From 100 marks to 100l.	0	10	0
From 100l. to 200 marks	0	13	4
From 133l. 6s. 8d. to 166l. 13s. 4d.	0	16	8

(a) If defendant is not to be arrested but served, the usual notice must be put at the end of the *capias* to appear, stating the day of the month as in other process.

(b) These writs must be returnable in the same, or the next term, for where a term intervenes between the teste and return of the *capias*, it is null and void. 2 *Black. Rep. 846.*

	£	s.	d.
From 166l. 13s. 4d. to 200l.	1	0	0
And for every 66l. 13s. 4d. more	0	6	8
And for every 100l. more	0	10	0
Every 100l. pays 10s. fine. R. H. 6 W. & M.			

Middlesex (ss) Command A. C. late of *Westminster*, Precipe for in the said county, merchant, that justly, &c. he render an original in to J. B. 100l. of lawful money of Great Britain, which debt. he owes to, and unjustly detains from him, as it is said, &c. and unless, &c.

George the third, &c. to the sheriff of *Middlesex*, Capias there- greeting: We command you, that you take A. C. late of on. *Westminster* in your county, merchant, if he be found in your bailiwick, and him safely keep, so that you have his body before us on the morrow of All Souls, where- soever we shall then be in *England*, to answer J. B. in The penalty a plea, that he render to him 100l. of lawful money of of the bond. Great Britain, which he owes to and unjustly detains from him, as is said; and have there this writ. Witness, &c. *Kerjon*.

If it be at the suit of an executor or administrator, leave out the words, "owes to," and say, "unjustly detains."

If the defendant cannot be taken on the capias, plain- Alias and tiff may sue out an alias, and after that a pluries; only pluries. adding to the alias "as formerly we have commanded you;" to the pluries "as oftentimes we have commanded you."

If the defendant cannot be found in the county where Testatum. the first writ was issued, or where you intend trying the cause, then sue out a *testatum capias* against him into that county where he is to be met with, directed to that Testatum sheriff, and after the words, "to the said A. B. his de- part. mage of 100l. as is said," add these, "And our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said C. was not found in his bailiwick, whereas it is testified in our same court before us, that the said C. lurks and wanders up and down in your county; and have there this writ. Witness, &c."

The teste of the alias is on the *quarto die post* of the Teste of the return of the capias, and the teste of the pluries, is on the alias and pluries, *quarto die post* of the alias.

And N. B. the testatum may be had in the first instance, Testatum in without really suing out the capias, but you pay the fla- the first in- zer for it, who ought to make it out, to warrant the tes- stance. tatum.

These writs, when sealed, are taken to the sheriff's office (if bailable) for warrants thereon, for which pay 2s. 6d. officer for arrest, 10s. 6d. in town, country 1l. 1s.

How to appear (if no bail required.)

When to appear and with whom. The appearance is to be entered in eight days after the *quarto die post* of the return, and filed with the filazer, for which pay 3s. 6d. and a memorandum or warrant on a 5s. stamp, is to be filed at the same time. (a)

Præcipe for appearance. *Middlesex (ss)* Appearance for A. C. at the suit of J. B. to a *capias*, returnable, &c.

J. B. attorney.

Affidavit of service.

If the defendant be served with an alias or pluries, then he is to enter his appearance in eight days next after the *quarto die post* of the return; if not, the plaintiff may then enter an appearance according to the statute, on an affidavit of the service; stating that the defendant was personally served on such a day with a true copy of a writ of special to leave it with the sheriff for a return. As soon as the *capias*, or alias or pluries, special *capias*, (as the case may be,) issued out of and under the seal of this honourable court, returnable on, &c. wheresoever the king should then be in England, under which copy was written an English note to the defendant, of the intent of such service, pursuant to the statute in that case made and provided.

How to appear if Special Bail required.

If special bail when to be put in on first return.

If the action requires special bail, and the defendant be arrested in *London* or *Middlesex*, the defendant must put in his bail before a judge within four days after the *quarto die post* of the return; if he is arrested in any other county, then within six days after the *quarto die post* of the return.

If either the fourth or sixth day fall on a *Sunday*, the defendant has all the *Monday* following to put in bail. N. on R. M. 8 *Ann. Reg.* 1.

If writ be returnable on any other return.

If the writ be returnable on any other return than the

(a) An additional 6d. is paid for every other defendant to the filazer.

first, the defendant has, in town causes, four days after the *quarto die post* of that return, exclusive of the one day to put in his bail; if the arrest be in any other county, six days after the *quarto die post* of that return.

Bail were not put in till two days after the *quarto die post* of the second return of the term; plaintiff assigned the bond. Motion to set aside the proceedings, on the ground that he had four days after the *quarto die post* to put in bail. The court held, that by *original*, the defendant had eight days from the return of the writ, (which is four days from the *quarto die post*,) and a case was cited by the master, of *Brownell v. Taylor*, M. 6 Geo. 3. Rule absolute. *Frampton v. Barber*, 4 Term Rep. 377.

Bail by original is to be put in, in the county where the *capias* issues; for which purpose apply to the filazer for a short copy of the *capias*, and sum sworn to, then make a note of the names of plaintiff and defendant, and also the names and additions of the bail, on a slip of paper thus:

_____ (to wit) Special <i>capias</i> into S. against C D. Special bail-	
ats. A. B. returnable on, &c. damages	l. piece.

The bail are I. K. of, &c.
and
G. H. of, &c.

M. N. attorney (or agent.)

Each of the bail in l.

Take the bail with the filazer (a) to a judge's chambers, (in term time he attends there regularly,) who will take their recognizance in double the sum sworn to, and pay him 17s. If sent from the country with affidavit of the due taking and the affidavit of justification take the bail-piece to the judge's chamber, to be allowed, pay 2s. and then take same and warrant annexed to the filazer, and file same with him; pay 17s.

Give notice to the plaintiff's attorney, the same as in common cases, only say, *put in with the filazer, before the Honourable Mr. Justice* _____, at his chambers in *Serjeant's Inn, Chancery Lane, London*, and the names are, &c. Notice of bail.

Where the defendant was arrested on a *testatum capias*

(a) The filazer for *Essex* and *Monmouthshire*, *Andrew Edge, esq.* All other counties, the *Hon. George Kenyon*.

from *Middlesex* to *Kent*, and bail was put in in the latter county, *Kent* being inserted in the bail-piece, but in the margin these words "*testatum* from *Middlesex*;" the court held that the notice in the margin made it regular. *The King v. the Sheriff of Middlesex*, in the cause of *Bridge v. Smith*, 3 *Maule and Selw.* 532.

Exception. If plaintiff excepts, he does it in the filazer's book within twenty days, and delivers notice of such exception to the opposite attorney.

How to justify. If there is an exception, then give notice to justify as by bill, and the same days are allowed. On the day of justification get the filazer to go to *Westminster* with his book, counsel to move 10s. 6d. filazer 7s. 6d. court fees 9s. Have affidavit of the service of notice ready, as by bill.

May rule the sheriff. The plaintiff may rule the sheriff to return his writ, and bring in the body in the same manner as by bill; but the rules must keep pace with the defendant's time.

May deliver declaration de bene esse. The plaintiff may deliver his declaration *de bene esse*, upon the *quarto die post* of the return of his writ, and defendant has the same time to plead as by bill, or file it with the clerk of the declarations, the same as by bill.

If the action be brought in case, then the declaration runs thus:

Declaration in assumpsit. *Middlesex* (ss) A. C. late of *Westminster*, in the county of *Middlesex*, merchant, was attached to answer J. B. in a plea of trespass on the case, and whereupon the said J. B. by G. G. his attorney, complains, for that whereas (to the end of the *præcipe* as far as the damages, then say) "*and therefore he brings his suit, &c.*" (No pledges are to be added.)

Declaration in debt. *Middlesex* (ss) A. C. late of W. in the county of *Middlesex*, esq. was summoned to answer J. B. of a plea, that he render to the said J. B. 100l. of lawful money of Great Britain, which he owes to and unjustly detains from him; and thereupon the said J. B. by A. B. his attorney, complains, For that whereas, &c. (and conclude thus, "wherefore the said J. B. saith that he is injured and hath sustained damage to the value of 100l. and therefore he brings his suit, &c.")

How ingrossed, &c. The declaration being drawn, is to be copied on a 4d. stamp paper, and delivered or filed, the same as by bill: and the charge is the same.

In what county to lay the venue. If a *capias* issue into one county, and the declaration is laid in another, the bail are discharged, though it is

good against the principal, 8 *Lev.* 235. 245. otherwise by bill.

Defendant formerly was not bound to plead till he had oyer and copy of the original, if he demanded it; but now he cannot have oyer although he demand it, by rule *Trin.* 21 *Geo.* 3. and if he demands it plaintiff may sign judgment without giving it, if no plea filed. *Ibid.* Vide title *Oyer*. Must plead now without oyer of the original writ.

If the defendant pleads a special plea, he files it with the clerk of the papers; if generally, he may either enter it in the book kept by the clerk of the docquets, or deliver it to the attorney, on a 4d. stamp paper.

The clerk of the papers also makes up the paper book by original, if there be a special plea filed. Paper book.

But the attorney makes up the issue if the plea be general, or such a plea as need not be filed; in that case, he begins with the declaration first (as there is no memorandum by original), then the plea. And the award of the venire must be thus: therefore it is commanded to the sheriff, that he cause to come before our lord the king, from the day of the Holy Trinity, in three weeks, wheresoever he shall then be in *England*, twelve, &c. by whom, &c. and who neither, &c. because as well, &c. When attorney makes up the issue. Venire awarded.

The clerk of the papers always makes up the paper book or issue as of the term the declaration is filed or delivered, and impals over (if the plea is of a different term or the replication) to the term in which the issue is joined. (a) How clerk of the papers makes up the book.

In making up of the record, the *placitas* are the same as by bill, and after the first placita is entered, begin with the declaration, and go to the end of the issue delivered, enter the second placita, and then the jurata, thus: How to make up a record.

Middlesex (ss) The jury between J. B. by his attorney, plaintiff, and A. C. late of *Westminster*, in the county, merchant, defendant, of a plea of trespass on the case, is respited before our lord the king, until——, wheresoever he shall then be in *England*, unless, &c. (the same as by bill.) Jurata.

(a) I see no reason for this; I always make up the issue the term it is joined without an imparlance, as error in this case cannot be assigned.

How to pass
record.

Venire, &c.

The record is passed at the same place as by bill, the issue to be entered at the clerk of the judgments; venire and distringas are exactly the same, (except the return,) which must be on a general return day, wheresoever, &c. and the defendant's addition must also be put in, the venire and distringas are sealed, only pay 7d. each; *subpoena* is signed by Messrs. *Provost* and *Chambre*, pay 1s. 8d. seal 7d. a *præcipe* is left for the office as by bill.

Judgment by
default.

If the defendant suffers judgment to go by default, sign it on a four penny stamp paper, enter on the roll warrant of attorney, for plaintiff and defendant, and so memorandum, but begin with the declaration and sign it with the clerk of the judgments, same as by bill.

N. B. The entry on the roll in this case is of the term the declaration is of, as the original will be returnable that term, to warrant the judgment. *Vide* 1 *Wils.* 181.

Writ of in-
quiry.

George the third, &c. To the sheriff of *Middlesex*, greeting: whereas A. C. late of *Westminster*, in your county, merchant, was attached to appear in our court before us, to answer J. B. of a plea, for that whereas (to the end of the declaration); and it was in such manner proceeded, &c. (exactly the same as by bill, only make it returnable on a general return day wheresoever, &c.) pay sealing 7d.

With whom
to be left.

Leave it with the sheriff for execution, on the return day give a rule for judgment; and get the inquisition from the sheriff, stamp same with a 10s. stamp, and after the expiration of the rule tax the costs with the master; pay 2s. 6d. then you may sue out the execution.

The rule for
judgment.

The rule for judgment may be given on the return day (if not on a *Sunday*), and it expires in four court days after (*Sunday* or a dies non excepted). *Doe v. Roe*. Rule for judgment on inquiry. J. K. attorney.

Nonpros for want of Declaration by Original.

It has been already observed, that plaintiff must declare within two terms next after the return of the process; if he does not, defendant may sign his *nonpros* without giving a rule to declare, (provided he has appeared in the term the writ was returnable,) if no declaration be delivered. For unless he take immediate advantage of the plaintiff's neglect, the plaintiff may still deliver his declaration, and that within twelve months. *Orley v. Lee*, 2 *Term Rep.* 123.

As yet of the term of the Holy Trinity, 57th Geo. 3.

Witness, *Edward Lord Ellenborough.*

Middlesex (ss) J. B. puts in his place J. G. his attorney, at the suit of A. B. in a plea of trespass on the case.

Middlesex (ss) J. B. late of, &c. merchant, according to the form of the statute in such case made and provided, was served with a writ of our lord the king, called a *special capias ad respondendum*, issued out of the court of our said lord the king, before the king himself, directed to the sheriff of *Middlesex*, returnable in fifteen days from the day of *Easter*, wheresoever our said lord the king should then be in *England*, to answer A. B. in a plea of trespass on the case upon promises, to the damage of the said A. B. of 40l. And the said A. B. at that day appeared by J. S. his attorney, according to the form of the statute in such case made and provided, &c. (the same as by bill).

Nonpros for not declaring.

To be signed on a 10s. stamp paper with the clerk of the judgments.

The pleadings may be amended in the same manner as by bill. But if the declaration is amended, and judgment by default, get the cursitor to amend the *præcipe* before he makes out the original, otherwise you must petition the master of the rolls for this purpose. See 7 *Term Rep.* 299. 1 *H. Black.* 291. 1 *Bos. and P.* 342. 481. 2 *Bos. and P.* 109. 2 *Smith's Rep.* 392. Amendment.

PROCEEDING TO OUTLAWRY.

If the defendant is out of the kingdom, or absconds for fear of being taken, the plaintiff may proceed to an outlawry against him.

It formerly only lay for treason and felony, but now by the stat. of 19 *Hen. 7. c. 9.* "process of outlawry may be sued as well in actions upon the case as in actions of trespass or debt," vide 25 *Ed. 3. c. 17.* but it lies in no case but where a *capias* lies. 2 *Roll's Ab.* 76.

Outlawry, in civil actions, is considered as in the nature of civil process to compel an appearance to the suit; or, if after judgment, to procure satisfaction. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, he pays all the costs, puts in sufficient bail, and does every thing he can, to put the plaintiff in as good a condition as he would have been in originally; or, if after judgment, the outlaw pays the debt and costs, the court reverses the outlawry upon motion, without any writ of error. The form of the reversal always is, for the errors assigned, and other errors ap- Outlawry in civil actions.

pearing upon the record, though there is, in truth, no error at all. 4 Burr. 2549. *Res v. Wilkes*.

If defendant does not appear.

If the defendant does not appear upon the return of the original, a *capias* issues. *Off. Br. 22. Reg. Jud. 1. b.* If he does not appear, nor taken on the *capias*, an alias, and afterwards a *pluries capias* issues. *Ibid.* The *capias* ought to be conformable to the original, and the alias and *pluries* to the *capias*. And if the defendant is not taken, or does not appear upon the return of the *pluries*, an *exigi facias* issues, which is also to be conformable to the original and *capias*.

When proceeded on.

This mode of proceeding is used as well where, in an action against two, the one is arrested, and the other cannot be found; for you cannot declare against them separately, therefore the other must be outlawed previous to the declaration, 1 Str. 473. *Edwards v. Carter*; and in order to take care that the bail of the one be not discharged, on the last day of the second term obtain a rule to declare until the first day of the next term, and so from term to term until the outlawry be complete, which rule must be served on the attorney for the defendant who has put in bail. But if the defendant who is arrested be in prison, then on the last day of the second term, you must apply to the court, on an affidavit of facts, and having used all due diligence in proceeding to the outlawry against the other defendant, for a rule for further time to declare; the rule is absolute in the first instance; serve a copy on the defendant in custody, and stick up a copy of such rule in the King's Bench office, and if you have not completed the outlawry within the time mentioned in the rule, apply again as before; counsel's fee, 10s. 6d. rule 6s. 6d. See 2 *Crompt. 9. Barnes* 196. 401.

May be outlawed, although they live in Scotland.

Although the defendant's partners live out of the kingdom yet they may be outlawed; for where several persons contract jointly, plaintiff must sue all. In order to reverse the outlawry, they must put in bail, so that this proceeding may be the means of bringing them back to this country, where they may be sued by the defendant for a contribution. *Sheppard v. Baillie*, 6 Term Rep. 329. *Symonds v. Parminter*, 1 Black. Rep. 21. Such outlawries are not void by 31 El. c. 8. but voidable; and voidable only *sub modo*, by putting in bail by the party himself. Lee, C. J.

When to entitle the declaration.

If you outlaw other defendants, the declaration will be intituled the term the outlawry is complete, and not of the term the first writ is returnable. 1 Wils. 78.

If a latitat be sued against two, and one only be arrested and puts in bail, and you are obliged to sue the other to an outlawry, the original and other writs must be against both. If one of two defendants has put in bail, and proceeding to outlawry be had against the other defendant, the one who has put in bail cannot be outlawed, but a supersedeas must as to him be issued and allowed by the sheriff, who will return it on the *allocatur exigent*, and also return the other outlawed. *Vide 1 Str. 473.*

If a latitat be against two, and afterwards you proceed to outlawry,

If in a joint action against two, it appears, that one of the defendants has been outlawed upon a different process from that by which the others were brought into court, and no connection be shewn between the several writs of *capias* issued against each, as referable to the same original, as where the one was outlawed upon process by original, tested 10th *April*, returnable on the first return of Easter term, and continued down regularly to the time of the outlawry, and the other was arrested upon a special testatum *capias*, issued on the 24th *April*, in *Hilary* vacation, and tested in the preceding *Hilary* term, to which bail was put in, and the plaintiff declared against him alone, alleging the outlawry of the other defendant in the same suit, the court will set aside the declaration for irregularity. *Haigh and others v. Conway and Davidson, 15 East, 1.*

London, to wit, *Richard Fenn*, late of &c. was attached to answer *John Denn*, in a plea, &c. and whereupon, &c. complains, for that whereas the said *Richard* and one A. B. (which said A. B. by due course of law, has been outlawed at the suit of the said *John Denn*, in this plea and suit, and still remains so outlawed) on the, &c. See 7 *East's Rep.* 50. 3 *East*, 144. *Brownl. Rep.* 197. *Lill. Ent.* 20. 1 *Brownl.* 20.

Form of declaration.

How to proceed.

The first thing is to prepare an affidavit of the debt (if you mean to hold him to bail), then make a præcipe for the original as before, and take great care that the debt accrued due *before* the teste of it, otherwise it will be bad; but if he is not to be held to bail, then make a præcipe only, carry it to the filazer, pay him for same according to length, and the fine to the king as before; he will make out a *capias*, *alias* and *pluries* thereon, and the *capias* ought to be tested on the *quarto die post* of the return of the original, the *alias* on the *quarto die post* of the return of the *capias*, as also the *pluries* on the *quarto die* of the

A memorandum or warrant to be filed for plaintiff on a 5s. stamp.

alias, and they are to be sealed : then leave them with the sheriff of the county where the *venue* is laid for a return of *non est inventus*, pay 1s. each name ; when the sheriff has made his return, take them to the filazer, who will make out an exigent (which is to be conformable to the original and *capias*) and proclamation ; the first of which requires the sheriff to cause the defendant to be demanded or exacted, in five county-courts successively, to render himself, and if he does, then to take him, as in a *capias*.

Second writ.

The second commands the sheriff of the county, in which the defendant dwells, or last dwelt, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place, 6 *H. 8. c. 4.* 31 *Eliz. c. 3.* The writ is to bear teste and be returnable the same as the writ of exigent, and to be sent to the sheriff where the defendant dwells, or was last resident, to execute. N. B. The filazer files the warrants of attorney.

Notwithstanding outlawry, the act remains joint.

Where the plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment. Held that he could not have a *sci. fa.* against his administrator, for notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant. *Fort and others, assignees, &c. v. Catherine Oliver, administratrix, &c. 1 Maule and Selw. 242.*

When to have an allocatur.

If there are not county-courts, (or hustings, if in *London*,) sufficient, between the teste and return of the exigent, you may have an allocatur exigent, allowing as many exactions of the defendant as there are between the teste and return, and demanding him again to appear ; and upon the allocatur, if there are not five exactions returned, you must have another, which the filazer also makes out, pay 9s. seal 7d. *Kitch. 264.* But if any county-day be past between the last of the former county-days and the return, no allocatur shall issue, but you must have a new exigent, for the demand of the party must be at five county-courts successively held one after another, without any county-court intervening. *Plow. Com. 371. b.* It is said the quickest way is to proceed in *London*, as the hustings are held oftener than the county-courts. (a)

(a) In *London* the hustings are holden once every fortnight. 3 *Lev. 245.* County-courts are held every six weeks only ; therefore it is best to outlaw in *London*. *Trye, 66.*

If the defendant does not appear at the return of the *exigent* or *allocatur*, by putting in bail, or filing a common appearance (as the case requires), there shall be judgment *quod utlagat*. *Kitch.* 263. then sue out a *capias utlagatum*, "which is to extend the goods and chattels, lands and tenements, of defendant, and to take his body also:" if he be taken, he gives bail as hereafter; if goods, &c. be taken, get the sheriff to take an inquisition thereon (but no notice is required to be given to the defendant,) produce witnesses before the sheriff to prove deeds, or any other thing taken, that they are the defendant's, and an appraiser who has made appraisement thereof, to prove the value. (b)

How to proceed upon the *capias utlagatum*.

As soon as the *capias utlagatum* is returnable, get it from the sheriff, take a copy for yourself, carry it to the flazer, and he will make a transcript thereof, which take and file with your clerk in court, in the Exchequer office, King's-bench walks. Upon receipt of it, he will give an eight day rule on the back of the transcript, if there be so many days in term, otherwise the rule must be for the general seal after term for any one to come in and claim the goods seized; if no one claims, then he makes out a *venditioni exponas*, directed to the sheriff, to sell the goods and chattels appraised, and found upon the inquisition. Transcript.

If the plaintiff gets a friend to take them at the appraised value, pay the money to the sheriff, who will make a bill of sale of the same; or if leases are taken in possession he will assign same, and return the *venditioni exponas*, which is filed with your clerk in court. The sheriff is to be paid his poundage thereon. How to proceed after sheriff's return.

If the debt be above 50l. but not otherwise, then prepare petition to the lords of the Treasury, "praying that the money levied, and in the hands of the sheriff, may be paid to the plaintiff, towards satisfaction of his debt and costs;" a certificate of the transcript must be certified by the clerk in court under the petition, which leave at their office (a fee extra is requisite to their clerk for expedition): their answer is, "a reference to H. C. Litchfield, Esq. their solicitor," of Lincoln's Inn New-square, who will, on request, order you to appear before him, to make out the plaintiff's demand; he will require Petition, &c.

(b) See the sheriff's duty in my Office of Sheriff, 294. edit. 1812.

an affidavit of the plaintiff, sworn before a judge, together with an affidavit of his having paid his solicitor the costs annexed. N. B. If the action be upon *notes, bills, bonds*, or other *securities*, he will require them to be produced before him, and upon his report, what there is due for the debt, and perhaps he may report the costs (for it is discretionary, they being given by the lords); then file the same with the clerk of the treasury, and get him to procure the king's sign manual, for the attorney-general "to consent to your motion that the money may be paid over to the plaintiff;" after the king's sign manual is obtained, give brief to counsel, with half-a-guinea, to move the court of Exchequer, "that the money returned upon the *venditioni exponas* by the sheriff of *Middlesex* be paid to the plaintiff;" also give brief to the attorney-general to consent, pay him 2l. 2s. clerk 2s. 6d. and on such motion and consent, the court will order it to be paid accordingly.

If 50l. only, then no need for the king's sign manual.

But if the sum levied exceed not the sum of 50l. there need no application to the treasury; for the court of Exchequer, upon reading the return of the *venditioni exponas* will upon motion of your counsel only, order it to be paid.

Clerk in court draws up order and makes out a subpoena; when to move for an attachment.

Exigent.

The clerk in court will then draw up the order, and seal a subpoena at the same time for the sheriff to pay the money to plaintiff forthwith, which plaintiff may demand at the sheriff's office, and if not paid he may move for an attachment against him.

George the third, &c. To the sheriff of *Middlesex*, greeting: we command you, that you cause C. D. late of *Westminster*, in your county, merchant, to be demanded from (or if in *London*, say, hustling to hustling) county-court to county-court, until, according to the law and custom of our kingdom of *England*, he be outlawed, if he does not appear; and if he does appear, then that you take him and safely keep him, so that you have his body before us, on wheresoever we shall then be in *England*, to answer to A. B. of a plea, for that whereas (here insert the whole *præcipe*), to the said A. his damage of 600l. as it is said; and whereupon you did return to us on last past (the return of the pluries) that the said C. D. was not found in your bailiwick; and have you there this writ. Witness, *Edward Lord Ellenborough*, &c. *Kenyon*.

To be signed by the filazer, pay him according to length, and seal 7d.

George the third, &c. To the sheriff of *Middlesex*, *Proclamation.*
greeting; whereas, by our writ, we lately commanded
you, that you should cause C. D. late of *Westminster*, in
your county, merchant, to be demanded from (a) county- (a) *Husting to*
court to county-court, until, according to the law and *husting, if in*
custom of *England*, he should be outlawed, if he did not *London.*
appear; and if he did appear, then that you should take
him and keep him safe, so that you might have him be-
fore us on wheresoever we should then be in
England, to answer to A. B. in a certain plea of trespass
on the case, to the damage of the said A. 600l. as it is
said; (b) we therefore command you, that in pursuance
of the statute made in the 31st year of the reign of *Eliza-*
beth, late queen of *England*, you cause the said C. D. to
be proclaimed upon three several days, according to the
form of that statute, one of which proclamations shall be
made at or near the most usual door of the church of the
parish where the said C. D. is dwelling, that he render
himself unto you, so that you have his body before us at
the aforesaid time, wheresoever we shall then be in *Eng-*
land, to answer to the said A. B. of the plea aforesaid;
and have there this writ. Witness, &c. *Kenyon.*

To be also signed by the filazer, pay him 8s. sealing 7d.

A man outlawed in a personal action, forfeits his goods What the de-
and chattels, 1 *Salk.* 305. and his chattels real, as a term *fendant for-*
for years, 2 *Rol.* 806. l. 43. If tenant at will sow his *feits.*
lands, the king shall have the emblements. *Ibid.* The
king shall have all the profits of his freehold lands.
2 *Rol.* 807. But in a personal action it shall be for the
benefit of the party. *Cas. in Parl.* 73.

In personal actions he does not forfeit any lands of What defen-
which he has estate of freehold, 2 *Rol.* 807. nor a real *dant shall not*
charge for life, *Hut.* 54. Copyhold not liable to be seiz- *forfeit.*
ed, *Parker*, 190.

As to the sheriff's return, see my Office of Sheriff, 318.
3d edit.

George the third, &c. To the sheriff of *Middlesex*, *Non omittas*
greeting: we command you that you omit not by reason *special capias*
of any liberty in your bailiwick, but that, by the oath *utlagatum.*
of good and lawful men of your county, you diligently
inquire what goods and chattels, lands and tenements, C.

(b) The filazer always makes this writ out, without
setting forth the *præcipe* at large.

The day he
was outlawed.

D. late of *Westminster*, in your county, merchant, bath or had in your bailiwick, the day of last past, or at any time afterwards, on which day he was outlawed in your county, at the suit of A. B. in a certain plea of trespass on the case, to the said A. B. his damage of 600l. as you have returned to us some time since, and by their oath cause the same to be extended and appraised, according to the true value thereof: and what you find by that inquiry take into our hands, and cause the same to be safely kept, so that you answer to us for the true value and issues thereof, and having so extended and appraised the same, what you shall have done herein, make known to us on wheresoever we shall then be in England, distinctly and plainly under your seal, and the seals of those by whose oath you shall have made that extent and appraisement: and for that the said C. D. so being outlawed, conceals himself, and runs up and down from place to place in your county, in contempt of us, and in prejudice of our crown, as we are informed: we command you, that you take the said C. D. wheresoever he shall happen to be found in your bailiwick, as well within liberties as without, and keep him safely, so that you have his body before us at the aforesaid time, wheresoever we shall then be in England, to do and receive what our said court before us shall in this case determine, and have you there this writ. Witness, &c.
Kenyon.

To be signed by the filazer, and sealed; pay signing & seal 7d.

What debts are liable to be seized upon the *capias utlagatum*, and how the king is to recover them; he can only take the profits of the land.

When the outlawry is returned on the *exigi facias*, by the sheriff, and recorded in court, execution may be taken out against the party outlawed, either *general* to arrest the body, or *special* to arrest the body, extend the goods, lands, and also debts and *choses* in action belonging to the party outlawed, *Lut.* 330; and when such inquisition is returned by the sheriff, a transcript of the outlawry and inquisition is returned into the Exchequer, and thereupon if any debt be returned due from any one to the outlawed, on application to the Exchequer, a *sci. fa.* issues to such person to shew cause, why the king should not have such sum found due on the inquisition to the outlawed; and therefore the transcript of this record is sent into the Exchequer, that the court of ordinary revenue may have it in charge; but the court of Exchequer usually grants a *custodiam* to such person as sued the outlawry. *Hard.* 422. *Carth.* 441. *Yelv.* 19. 2 *Vern.* 314.

If the defendant be taken upon the *capias utlagatum*, If defendant the plaintiff cannot declare against him in that action ; be taken, cannot declare. for the process is determined. *Cro. Eliz.* 706.

To the Right Honourable the Lords Commissioners of his Majesty's Treasury.

The humble petition of A. B.

Sheweth,

That C. D. late of merchant, being justly indebted unto your petitioner in the sum of upon a promissory note of hand, bearing date the 22d day of June, 1817, and also in 20l. for goods sold and delivered to the said C. D. your petitioner was obliged to outlaw him for the recovery thereof. Petition to the lords.

That a writ of special *capias utlagatum* having issued against him, out of his majesty's court of King's Bench, at *Westminster*, at the suit of your petitioner, an inquisition was taken thereon by the sheriff of *Middlesex*, whereby certain goods and chattels to the value of 80l. mentioned in the said inquisition, were by the said sheriff seized, and taken into his majesty's hands ; which writ and inquisition being transcribed into his majesty's court of Exchequer, at *Westminster*, a writ of *venditioni exponas* duly issued out of the said court, whereon the said sheriff hath returned, that he has, by virtue thereof, sold the goods and chattels in the said writ mentioned, for the sum of 1l. being the dearest price he could get for the same ; which monies he had before the barons of the king's Exchequer at *Westminster*, at the day in the said writ mentioned, ready to be paid to his majesty's use.

That as your petitioner has been at great expence in the said proceedings, and as his majesty is not concerned in interest, but his name only made use of by your petitioner for the recovery of his said debt ;

Your petitioner therefore humbly prays your lordships, that his majesty's attorney general may be authorised to consent on behalf of his majesty, that the sum of 1l. may be paid to your petitioner towards satisfaction of his said debt and costs.

And your petitioner shall ever pray, &c.

These are to certify that in term, in the year of the reign of his present majesty king George the Certificate of the clerk in court.

third, a transcript of an outlawry was returned and filed in this court against C. D. late of, &c. merchant, outlawed in *Middlesex*, at the suit of A. B. in a plea of trespass on the case; by which transcript it does appear, that several goods and chattels of the said C. D. were seized into his majesty's hands by and Esq. then sheriff of the said county of *Middlesex*, by virtue of a special *capias utlagatum*, in the said transcript specified; and I further certify, that a writ of *venditioni exponas* has issued, for selling the said goods and chattels so seized, whereon the said sheriff hath returned, that he hath sold the same for the sum of l.

A. B. plaintiff,
and

In the King's Bench.

C. D. defendant.

Affidavit.

A. B. of, &c. maketh oath and saith, that the above named C. D. is justly and truly indebted unto this deponent in the sum of according to the annexed account, and also in the further sum of 23l. for costs paid to Mr. G. C. this deponent's solicitor, in prosecuting the outlawry in this cause against the said C. D.

The order for the payment of the money, and the *subpoena*, are made out by the clerk in court.

Of Bail to the Capias utlagatum.

How to reverse outlawries in all cases but treason and felony, without appearing in court.
If bail not required.

(a) By stat. 4 & 5 W. & M. c. 18. no person who shall be outlawed in this court for any matter, cause, or thing, (treason and felony only excepted,) shall be compelled to come in person in this court to reverse such outlawry; but he may appear by attorney, and reverse the same without bail in all cases (except when special bail shall be ordered by the court.) And if any person outlawed shall be arrested on a *capias utlagatum* out of this court, the sheriff who has taken such person (in all cases where special bail is not required by the court) may take an attorney's engagement under his hand to appear for the defendant, and to reverse the said outlawry and discharge the defendant from such arrest; and where

(a) This act relates only to civil actions; this is evidently the true spirit of it, neither can it extend to taking bail in cases not bailable. *Aston, J. 4 Burr. 2541. Res v. Wilkes.*

special bail is required, the sheriff may take security of defendant by bond with one or more sufficient surety in the penalty of double the sum for which special bail is required, and no more, for his appearance by attorney in court at the return of the writ, for performing such things as shall be required; and after such bond taken, then to discharge him, sect. 4. Also where any person is arrested upon an outlawry, and cannot within the return of the writ give security as aforesaid, in cases where special bail is required, so as he be committed to gaol for default thereof, that whensoever he shall find security to the sheriff, for his appearance by attorney in the said court, at some return in the ensuing term, *to reverse such outlawry, and to do and perform such other thing and things as shall be required by the said court.* It shall be lawful for the sheriff after such security taken to discharge him; sect. 5. This act relates to cases where no special bail is required, and to cases where special bail is required: and the sheriff is directed what to do in either case; where the action is bailable, the defendant is to be discharged upon the security bond. But even in civil actions, he could not be bailed; where he was not bailable, he is only to be put in the same condition as if he had not been outlawed at all. If the outlawry was after judgment in debt, or any other civil action, and the defendant was *not bailable* before the outlawry, the act did not make such defendant bailable, who was not so before the outlawry. Lord *Manfield* and *Yates J.* said, the concluding words of the security bond, "and to do and perform such things as shall be required by the said court," mean putting in bail to a new action, pleading within a limited time, putting the plaintiff in the same condition, and such like matters. Before this act, no bail could be taken on a *capias utlagatum*. Vide 13 Car. 2. stat. 2. c. 2. s. 4. *Rex v. Wilkes*, 4 Burr. 2539, 2540.

Where bail is required.

In the case of *Campbell v. Daley*, the question was, whether in a case originally requiring special bail if the defendant stand out to an exigent, he can come in, and appear to the exigent, without putting in special bail: it was ruled by the court, that there ought to be special bail. It would be very unreasonable that the defendant should gain an advantage by standing out till process of outlawry. He certainly ought not to be in a better condition, than if he had appeared at first. And the filazer was ordered not to issue a supersedeas till bail put. *Campbell v. Daley*, 3 Burr. 1920. This case is now reported

If defendant appears to the exigent in a bailable action, it requires special bail. 31 Eliz. c. 3.

right; upon inquiry it was upon the exigent before outlawry. See *Tidd*. 132, in (n).

When bail, though no affidavit.

If the *capias utlagatum* recites a *special original*, *specially expressing the cause of action*, the sheriff must take bail, though the *capias utlagatum* is not marked for bail; for process of outlawry is not within 12 Geo. 1. c. 29. for preventing frivolous and vexatious arrests, nor can defendant reverse the outlawry, without giving such bail as the law requires. *Cracraft v. Gledore*, 3 Burr. 1482. (a)

Appearance before the quintus exactus.

If the party defendant appears before he is returned outlawed, he does it upon the *exigent*, (and if no bail is required in that case,) he enters such appearance with the filazer, who thereupon makes out a *supersedeas* to the sheriff, to stay all further proceedings; pay signing 8s. seal 7d.

If bailable.

If it is bailable, then bail must be put in and perfected, by giving notice two days before exclusive, to the plaintiff's attorney, of the names and places of abode of the bail, and the time of justifying; bespeak the book of the filazer, to go to *Westminster*, for that purpose, who enters and takes the bail in the usual manner (though you may put in bail first at a judge's chambers, and give notice of justifying after): motion by counsel for that purpose 10s. 6d. *filazer* if put in at *Westminster*, 11. Os. 6d. *aliter* at chambers, 17s. and for the justification 7s. 6d. court fees 9s. rule for the allowance of bail 6s. 6d. As soon as bail is complete, draw up the rule for the allowance, and the filazer makes out the *supersedeas*, which deliver to the sheriff, who returns the allowance upon the *exigent* in this manner.

Return.

"I have altogether ceased from executing this writ, "having received his majesty's writ of supersedeas for "that purpose." The answer of, &c. Pay the sheriff for the allowance 2s. 6d. See my Office of Sheriff, 318 edit. 1812.

The filazer, if he goes to *Westminster*, charges 3s. 6d. for his attendance extra to put in bail, or justify.

How put in bail, to reverse upon the *capias utlagatum*, and no arrest.

If it be upon *mesne* process (and no bail required) then upon entering a common appearance with the filazer,

(a) It appeared that an affidavit of the debt had been filed, and all the preceding writs had been marked for bail. See 5 Geo. 2. c. 27. s. 5.

pay 3s. 6d. leaving with him a memorandum or warrant on a 5s. stamp, and getting his certificate thereon, a judge, at his chambers, will grant an order to reverse the outlawry.

But if special bail is required, (upon perfecting same,) you may move the court to reverse the outlawry directly after justification; but if done after, it must be moved "on an affidavit made of perfecting the bail," and must be on payment of costs taxed.

Where bail is required after it is put in, may move to reverse the outlawry.

If the person outlawed, at the time of the outlawry pronounced, was within the age of discretion, as if he was an infant, under fifteen years, it may be avoided. 2 Roll. 805. Dy. 239. So if a woman at the time she is waived, was covert baron. 2 Roll. 806. So if a man, at the time of his outlawry, was in prison, it will be error. Lit. s. 437. 2 Roll. 803. But if by covin or consent, it will not avoid. Co. Lit. 259. b. If a man at the time of his outlawry was out of the realm, it will be error. Skin. 6. So in the king's service, with a captain of war. 2 Roll. 803. So if out on his private business out of the realm. Ibid. 804. But not if he goes with intent to avoid process. Ibid. l. 30. And it may be avoided either by plea or writ of error. Co. Litt. 259. b. If for matter appearing on record, the party may reverse it by plea. Co. Litt. 529. b. or for omission of any process, Ibid. or variance, Ibid. But it is discretionary on motion; but generally, where the outlawry is avoidable for matter of fact, if not in felony, &c. it must be avoided by writ of error. Ibid.

How avoided.

If the goods of the person outlawed be taken by the sheriff, and after the outlawry is reversed by writ of error, the defendant shall be restored to the goods again, because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king. 5 Co. 90. 1 Rol. Abr. 778. Cro. Eliz. 278. 2 Jon. 101. 5 Mod. 61. Also all his lands and tenements, though the king has granted them to another and his heirs. 1 And. 188. Cro. Eliz. 278. 2 Vern. 312. And he may enter upon the reversal, without petition, or *scire facias*. Ibid.

If goods be taken after reversal, defendant shall be restored to them.

The defendant cannot be taken on a Sunday upon a *capias utlagatum*, stat. 29 Car. 2. c. 7. though the court will not attach the sheriff, but leave the defendant to his remedy given by the statute. Barnes, 319. Osborne v. Carter.

Defendant cannot be taken on a Sunday.

Of Error to reverse.

If error be brought for want of proclamation, the defendant must put in bail, not only to answer the plaintiff in the former suit, but to a new one.

Since the 4 & 5 W. & M. a writ of error to reverse the outlawry in civil cases, is seldom heard of. But before allowance of a writ of error, or reversing an outlawry, by plea or otherwise, for want of proclamations, the stat. 31 *El. c. 3. s. 3.* requires, that the defendant in the original action shall put in bail not only to appear and answer the plaintiff in the former suit in a new action to be commenced by him for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after allowance of the writ of error, or otherwise avoiding the said outlawry. (a)

Bail for condemnation.

The bail are answerable in this case for the condemnation money. *Lee, C. J. 1 Wils. 3. Serocole v. Hanson. 1 Salk. 496.*

No bail in error of an outlawry till reversal.

Pending error to reverse an outlawry on mesne process, the defendant moved to quash the writ, because no bail was given. *Cur.* That is never done till the outlawry is reversed; and then we take bail to appear to an original to be brought within two terms, which was done. *Str. 951. Duckett v. Martin.*

Where special bail is required on reversal of outlawry, although no affidavit be made previous,

The defendant was outlawed without affidavit of debt, and brought error, and assigned his being beyond sea at the time of the outlawry, which court reversed; but the question was, on what terms, whether on special or common bail? The court, on considering 4 & 5 W. & M. declared they had a discretionary power to require bail or not, and the want of an affidavit of the debt before the outlawry, was no objection, because that is only requisite to warrant an arrest; and here was one in time, for the new action that must be brought. And though 31 *Eliz.* is the only act that expressly requires bail; it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation. *Serocole v. Hampson, Str. 1178. 2 Salk. 496. 1 Wils. 3.* and the filazer takes the bail on the stat. 31 *El. c. 3. s. 3.* to

(a) The first process is determined by the outlawry. *Cro. Eliz. 707.* consequently the plaintiff cannot declare upon it, but must bring a new action.

pay the condemnation money. *Philips v. Warburton*, 12 Mod. 545. M. T. 1785.

A commission of bankrupt issued against the defendants who were milliners, in *March*, 1807, and plaintiff proved his debt, received a dividend of 3s. 6d. declared *Nov.* 1808, notwithstanding which, in *June* 1810, plaintiff brought her action by original for the balance, and obtained judgment of waiver against them in *Nov.* 1810; and in *October* 1811, the defendant *Watkins* was arrested, and her goods taken under a special *capias utlagatum*, after she obtained her certificate in the *June* preceding her arrest and levy; motion why the goods levied should not be restored, and the bail-bond given up to be cancelled. Lord *Ellenborough* said, that the court could not help the defendant till she had obtained a *locus standi in judicio*, and discharged the rule, with costs. Therefore she must put in the special bail to pay the condemnation money. The rule is that defendant must appear before he can move to reverse an outlawry. *French v. Moore*, M. 45 Geo. 3. *Tidd*, 140. In this case counsel stated that plaintiff had made his election to proceed under the commission; it appears to be a very hard case, but the certificate was not obtained at the time of the arrest.

The defendant was sued by special original and an affidavit of the debt made, the defendant outlawed afterwards came in, and brought error to reverse it, and assigned error in fact, "that he was beyond sea at the time of the outlawry," which fact was found for him by a jury. The postea being brought into court, motion that the judgment of outlawry might be reversed. This was opposed, because defendant would not enter into a recognizance to satisfy the condemnation money, as required by 31 *El. c. 3.* Lord *Ellenborough*. The error assigned was not the want of proclamation, but a common law error, the defendant's absence beyond sea; so that the case is not within 31 *El. c. 3.* and the defendant appeared in person; so that the case is not within the 4 & 5 *W. & M. c. 18. s. 3.* The reversal therefore is a common law reversal, for a common law error; and the court thinks it has no power to require more than an ordinary recognizance, which leaves the bail at liberty to render, which was ordered, *Havelock v. Geddes*, 12 *East*, 622. See the case of *Serocole v. Hampson*, fully reported in the notes 624. which was where the error assigned was defendant was beyond sea at the time of the exigent proclaimed, and the bail was to pay or render, and the outlaw appeared by attorney.

When a bankrupt who has been outlawed, and her person arrested, and goods taken upon a *ca. utlagat.* is not entitled to be relieved on motion.

Upon error to reverse an outlawry in a civil action for a common law error, the recognizance is to pay or render, and not absolutely to pay as in case of reversals on the stat. 31 *El. c. 3.* for want of proclamation, or on stat. 4 & 5 *W. & M. c. 18.* on application by attorney and by motion.

When the outlawry is reversed as at *common law*, it seems that the reversal is so far matter of right, that no terms can properly be imposed upon the defendant when it is pronounced. Per *Lord Ellenborough*, ib. 655.

It may be reversed by motion, if process is omitted, &c.

The outlawry may be reversed, by motion, if there is an omission of process, variance, or other matter apparent on the record. But for any matter of fact, as death, imprisonment, beyond sea, at the time of the exigent awarded, 2 *Str.* 1178. 1 *Lord Ray.* 349, the defendant is driven to his writ of error, unless in the case of felony, and there he may plead it. 2 *Str.* 1178. 1 *Wils.* 3.

The court upon motion reversed the outlawry of the defendant in a civil suit, upon his putting in bail in the alternative to satisfy the condemnation money, or render the principal and paying costs, including costs, if any, in the court of Exchequer, without requiring the recognizance of bail to be for the payment of the condemnation money absolutely. *Graham and another v. Guile*, 1 *Maule and Selw.* 409.

How to obtain Error.

How to obtain the writ. Comb. 19. T. Jones, 211.

The cursitor makes out the writ of error *de coram vobis*, and it is allowed by the court on motion. If the plaintiff does not appear and confess the errors, the defendant must sue out a *sci. fa. ad audiendum errores*, and upon two *nihils* returned, the court will reverse the outlawry of course; but if he comes in and does not confess the errors assigned, but joins in error, the defendant must make up the error-books, and go to argument and judgment as in other cases of error.

Clandestine outlawry.

If a person procures another to be outlawed clandestinely, who appears in public, the court will oblige such person to reverse the same at his own costs, 12 *Mod.* 413. but if it appears that the party outlawed had lurked backward and forward between two counties, and that the plaintiff had dealt openly, had been regular in sending proclamation to the sheriff where he sometimes resided, the court will not interpose in a summary manner, but leave the party to his ordinary remedy by plea, or writ of error. 2 *Vent.* 46. T. Jon. 211. Comb. 19.

When outlawry reversed.

When the outlawry is reversed, the defendant may be discharged, if in custody, by *supersedeas*, 13 *Car.* 2. stat. 2. c. 2.; and his property, if taken into the king's hands, shall be restored to him by writ of *amoveas manus* or otherwise, according to the course of the Exchequer.

Cro. Eliz. 278. 2 *Vern.* 312. *Bunb.* 105. 5 *Mod.* 61. For more of this, see my Office of Sheriff, 318. edit, 1812.

The plaintiff cannot be nonprossed after the outlawry Nonpros. reversed, for that writ is become void. *Pract. Reg.* 271.

Of declaring after Outlawry.

A new original must be sued out, the former being at *Cro. Eliz.* 707. an end after outlawry pronounced, for defendant undertakes to put in bail to a new original to be sued out within two terms. *Stat.* 31 *El. c.* 3. *s.* 3.

If he does not declare within that time, the bail are discharged: although the plaintiff is not barred of his action, provided he commences the same within one year after the reversal. *Stat.* 21 *Jac.* 1. *c.* 16. If no declaration, bail discharged, but plaintiff is not barred.

The venue need not be laid in the same county in which the former original was made. 3 *Lev.* 245. Venue.

By the 21 *Jac.* 2. *c.* 16. *s.* 4. it is enacted, That if in any action brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry: that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment of outlawry reversed, and not after. If defendant be outlawed.

Upon superseding the *exigent*, if plaintiff delivers a declaration, there should be a notice to plead, and a rule given, before judgment can be signed; and defendant has in such case the same time to plead as in other cases. Superseding the exigent, a declaration delivered.
See *Barnes*, 271, 2.

Outlawry after Judgment.

In case the proceedings were by special original, and the plaintiff has obtained judgment, he may proceed to outlaw the defendant; but previous to such proceeding, the plaintiff must issue a *ca. sa.* against the defendant into the county where the venue is laid; and the sheriff must return same, *non est inventus*; take the same to the filacer, and he will make out a writ of *exigent*, which leave at the sheriff's office to be returned, if he be not returned outlawed, then take the same to the filacer for an *allocatur exigent*, and deliver it to the under-sheriff for his return, if the defendant be returned outlawed by the sheriff on the *allocatur*, then take the same to the filacer, who will Sid. 159.
1 Leon. 329.
Trye, 77—24.

make out a *capias ullagatum* into as many several counties as you will, either in *England* or *Wales*, general or special; and if the defendant be taken, he cannot be discharged without reversing the same for sufficient error, or making satisfaction to the plaintiff.

Where there
needs no *sci.*
fa. to revive.

If the defendant be sued to outlawry *after judgment*, there needs no *sci. fa.* to revive the judgment after the year and day, because being outlawed, you may have execution on his effects at any time on behalf of the king, *Gilb. C. P.* 17.; for in this case, the *exigent* may be had on return of the *ca. sa.* without an *alias* or *pluries*, and also without a writ of proclamation. *Cro. Jac.* 671.

Rent.

The goods of a tenant are liable for a year's rent, notwithstanding an outlawry in a civil suit. 7 *Term Rep.* 259. *St. John's College v. Murcott*

INFANTS.

BY the common law, a male or female is called an infant till the age of twenty-one years. *Co. Litt.* 171. *b.* but by the civil law only till the age of seventeen years. *Ibid.*

In what cases
he is liable
and what not.

An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards: but if he bind himself in an obligation or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. *Co. Litt.* 172. *a.* 1 *T. R.* 40. *Truman v. Hurst.* He cannot bind himself in a bond in a penalty conditioned for the payment of interest as well as principal. *Fisher v. Mowbray*, 8 *East*, 330. An assumption on an account stated will not lie against an infant. 1 *T. R.* 40. necessities for an infant's wife, are necessities for him, but not if provided in order for the marriage. *Str.* 168. and upon such contract, by an infant, an *assumpsit* lies. *Lat.* 197. *Jon.* 146. *Pal.* 528. Or, if he gives a single bill for money upon such contract, it binds him. 1 *Roll.* 729. *l.* 20. *Cro. Eliz.* 920. 1 *Lev.* 86. The court will judge what things are necessary. *Cro. Eliz.* 583. If goods not necessary are delivered to an infant, who after full age promises to pay, he is bound. *Str.* 690. 1 *Term Rep.* 648. An infant shall be charged for a trespass done by him. *Com. Dig.* 3 *V.* 170. So infant of seventeen years of age shall be charged for malicious words. *Noy.* 129.

If a warrant of attorney be given by an infant and another, and judgment is entered up thereon, the court, on motion, will order the name of the infant to be struck out of the warrant of attorney, and set aside the judgment as against him. 2 Black. Rep. 1133. Vide Str. 1043.

If warrant of attorney be given by infant, and judgment thereon.

An infant is to prosecute a suit by his next friend, the law supposing where he demands or sues for any thing, it is for his benefit. And the power for infants to sue by *prochein amy*, or next friend, was first introduced by the stat. West. 2. (a)

How to prosecute and defend.

But if an infant defends, he must defend by a *guardian*, to be assigned by the court, with his consent. If he will not consent, the court then may assign a guardian for him, on application by the plaintiff, otherwise it would be a great prejudice in delaying of justice. Sty. Pract. Reg. 322.

If he defends.

If an infant be joined with others, (as executor) in suing, in the right of another, the action may be brought by attorney; for they all make but one person in law. 3 Cro. 377. 2 Saund. 312.

If joined by others in suing, in right of another.

But in all cases where an infant is defendant, though it be in another's right, and though joined with others, he must defend by guardian. 2 Cro. 289. 1 Lev. 294. 2 Str. 784.

Infant defendant in all cases must defend by guardian.

If an infant plaintiff sue by attorney, and there be a verdict for him, it is not error. Stat. 21 Jac. 1. c. 13. And this now is extended to judgment by default. 4 & 5 Ann. c. 16. s. 2. Jenk. 301. pl. 68. Bulstr. 24. But if he be defendant, and appears by attorney, it is error. 8 Co. 58. b. 9 Co. 30. b. Cro. El. 569.

If he sue by attorney. If defendant.

If an attorney undertakes to appear for an infant, and enters it *per attornatum*, it may be amended and made *per guardianum*. Str. 114. 445.

If attorney undertakes to appear, he must do it by guardian.

Plaintiff's attorney should apply to defendant to name a guardian; and if he does not in six days, apply to the court to oblige him to do it. 2 Wils. 50.

Before declaration, a guardian must be appointed.

The writ may be served at the suit of the infant, but before declaration, a guardian must be appointed by the court, which is done either by taking the guardian and in-

How plaintiff is to apply.

(a) He cannot be an informer on a penal statute. Say. Rep. 51.

fant before a judge at his chambers, or by petition; if by petition, it is thus:

In the King's Bench.
Between

{ A. B. the younger, plaintiff,
and
C. D. defendant.

Petition to assign a guardian.

To the Right Hon. Edward Lord Ellenborough, Lord Chief Justice of his Majesty's Court of King's Bench.

The humble petition of A. B. an infant, under the age of twenty-one years, the plaintiff in this cause,

Sheweth,

N. B. To be ingrossed on a 2s. 6d. stamp paper.

That your petitioner has, as he is advised, good cause of action against the above-named C. D. for assaulting and beating your petitioner, and that your petitioner has commenced an action in this honourable court, against the said C. D. for the same; but in regard that your petitioner is an infant under the age of twenty-one years, to wit, of the age of seventeen years;

Your petitioner, therefore, must humbly prays your lordship, to admit him to prosecute the said action by G. F. of, &c. merchant, your petitioner's next friend, against the said C. D.

And your petitioner shall ever pray, &c.

Underneath which petition, the petitioner must write his name, and the next friend signs his name under the following acceptance.

I do hereby consent and agree, that the above named A. B. the younger, shall be at liberty to prosecute the above action, by me as his next friend, according to the prayer of the above petition. Witness my hand, this day of 1817. Witness, J. G. attorney for plaintiff. (a)

To which annex the following affidavit, sworn before a judge:

In the King's Bench.
A. B. plaintiff,
and
C. D. defendant.

Affidavit

J. G. of, &c. gentleman, attorney for the plaintiff in this

(a) When defendant has appeared he may have a summons for the prochein amy's place of abode. 1 Wils. 146. So may the plaintiff have a like summons for the name and place of abode of the defendant's guardian.

cause, maketh oath and saith, That A. B. the above-named plaintiff, did, on the day of duly sign the petition hereunto annexed, in the presence of this deponent: and this deponent further saith, that he was also present, and did see G. F. the person mentioned in the said petition, duly sign the consent or agreement thereunder written, as the next friend of the said A. B.

Take the petition and affidavit to the judge's chambers, who will thereupon make his order for plaintiff to proceed. How to prosecute by his next friend, pay 12s. take same to the clerk of the rules for a rule thereon, pay 7s. 6d. and when you declare, annex a copy of the rule to the declaration.

The rule is generally drawn up to prosecute and defend all actions that may be in suit. One admission will do.

London (ss) A. B. by G. F. who is admitted by the court of our lord the king, before the king himself here, to prosecute for the said A. B. who is within the age of twenty-one years, as the next friend of the said A. B. complains of (as in other cases.) The form of the declaration.

In the issue, say in the memorandum (" comes A. B. Issue. " who is admitted by the court of our lord the king, before the king himself here to prosecute,") as before.

In the venire and distringas, say, A. B. " by his next friend, plaintiff." Venire and distringas.

An infant ought not to defend till a guardian is admitted for him to defend by some judge of the court, *Lill. Prac. Reg.* 72. nor plead. Infants defending.

But if he should appear and plead by an attorney, and the plaintiff finds it out, he may in vacation time apply to a judge for a summons (or in term to the court), for a rule to shew cause " why the common bail filed should not be struck out, and the plea be set aside, and that the defendant may be obliged to appear by a guardian;" and if no one is named within six days, the plaintiff may name one for him, which will be ordered of course. Vide 2 *Stra.* 1076. *Stone v. Atwell.* And a similar order may be obtained when he neglects to appear. 2 *Str.* 1076. 2 *Wilson*, 50. If he appear and plead by attorney.

Entitle the
cause.

In the K. B.

A. B. against C. D.

*To the Right Hon. Edward Lord Ellenborough,
Lord Chief Justice of his Majesty's Court of King's
Bench.*

*The humble petition of C. D. the above defendant, an
infant under the age of twenty-one years,*

Sheweth,

Petition to as-
sign a guar-
dian to defend.

That the above plaintiff hath lately commenced an action at law against your petitioner in this honourable court, for (here set forth the cause of action), and your petitioner is advised and believes that he has a good defence to make thereto; but in regard your petitioner is an infant,

Your petitioner humbly prays your lordship would be pleased to assign G. H. of, &c. as his guardian, to defend this suit.

" And your petitioner shall ever pray." C. D.

Acceptance.

I do consent and agree to be the guardian of the above C. D. an infant, according to the prayer of the above petition. G. H.

Witness, J. G.

Affidavit of the signing by the infant, and the acceptance of the guardian, is requisite in this case.

If guardian
appear at a
judge's cham-
bers.

In case the guardian appear before the judge's clerk, there is no necessity for an affidavit of his acceptance; pay 12s. rule 7s. 6d.

The infant must file common bail by his guardian at the suit of the plaintiff.

Annex the copy of the rule to the plea, or serve a copy on plaintiff's attorney: plea to be filed.

Plea of in-
fancy by
guardian.

And the said C. D. by G. H. who is admitted by the court of our lord the king here, to defend for the said C. D. who is under the age of twenty-one years, comes and defends the wrong and injury, when, &c. and says, that he the said C. at the time of the making the said several promises and undertakings in the said declaration mentioned, was under the age of twenty-one years, to wit, of the age of nineteen years, and no more, to wit, at London aforesaid, &c. and this he is ready to verify; wherefore he prays judgment if the said A. ought to have or maintain his aforesaid action thereof against him, &c.

S. M.

If the defendant does not appear by guardian in the time allowed by the rules of the court, the plaintiff must procure an affidavit of the service of the process, and that the defendant is an infant, and that he hath not appeared; upon which the judge, without taking out a summons, will make an order, "that unless the infant appears by guardian within so many days after personal service of the order, plaintiff may assign *John Doe* for guardian, and enter appearance for defendant;" and upon affidavit of the service of this order, the judge will make the order absolute, and then an admission is drawn up and filed as aforesaid. *Vide Str.* 1076. *Stone v. Atwell.*

If infant does not appear by guardian, how plaintiff is to proceed.

It is said the infant plaintiff, who sues by *prochein amy*, is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable, *2 Str.* 548. (a) *James v. Hatfield, Barnes*, 128. *Cro. El.* 33. *2 Str.* 708. *Cro. Jac.* 640.; and if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another who is. But where an infant plaintiff who had sued without *prochein amy* or guardian was in execution for costs, the court refused to relieve him. *13 East*, 6. And an infant defendant (although he names as guardian) is liable to costs, if the verdict be against him. *Dy.* 104. *1 Bulstr.* 189. *Str.* 708.

Infant plaintiff not liable to costs, but *prochein amy*, &c.

Infant defendant is liable, although he names a guardian.

If in execution for costs.

The costs must be demanded of plaintiff's next friend, and on refusal, you may move for an attachment on an affidavit of the facts. *Cro. Eliz.* 33. *1 Str.* 548. *Willis* 190.

Costs to be demanded.

If the plaintiff reply to a plea of infancy, that the defendant after he had attained twenty-one confirmed the promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time, *1 Term Rep.* 648. *Borthwick v. Carruthers.*

Confirmation of a promise.

(a) Yet it appears, that an infant plaintiff was taken in execution for the costs, and court refused to discharge him on motion. *2 Str.* 1217. *Gardiner v. Holt. Per Cur.* If costs cannot be given, it will be matter of error to be insisted on.

STATUTE OF LIMITATIONS.

To save the statute of limitations, it is proper for the plaintiff to commence a suit, by actually suing out process against the defendant; and such process must be sued out before the time expires; it will not do by relation, for the defendant may in his rejoinder, set out the true time on which it is issued. 1 *Black. Rep.* 215. *Ld. Ray.* 432.

When the statute begins to run against a foreigner.

(a) If the plaintiff is a foreigner, and doth not come to *England* in fifty years, he has still six years after his coming into *England*, to bring his action; and if he never comes to *England* himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. *Strithorst v. Græme*, 3 *Wils.* 145.

If one plaintiff be abroad and the other in *England*.

If one plaintiff be abroad, and the other in *England*, the action must be brought *within six years* after the cause of action arises. *Perry v. Jackson and others*, 4 *Term Rep.* 516.

If in *England* at the time cause of action accrues.

If plaintiff be in *England* at the time the cause of action accrues, the time of limitation begins to run, so that if he, or in case he die abroad his executors, do not sue within six years they are barred by the statute. *Smith v. Hill*, 1 *Wils.* 134.

A bill of *Middlesex* or *latitat* may be sued.

A bill of *Middlesex* or *latitat*, in the first instance may be sued out in order to save the statute of limitations, which being done, take same to the sheriff for return of *non est inventus*, then enter the same on a roll, as of the term in which the writ is returnable, thus:

As yet of the term of St. Michael, 57th *Geo.*, the 3d 1817. Witness *Edward Lord Ellenborough*.

Entry of a bill of *Middlesex*.

Middlesex, } The sheriff is commanded to take C. D. to wit. } and *John Doe*, if they may be found in his bailiwick, and them safely keep, so that he may have

(a) An attachment of privilege, 2 *Black. Rep.* 1131, though informal as made on a general return day, will be a good commencement of an action to avoid the statute; but it is not a continuance of a bill of *Middlesex*, so as to avoid the statute. 3 *Term Rep.* 662. *Smith, one, &c. v. Bower*.

their bodies before the lord the king at *Westminster*, on *Friday* next after the morrow of All Souls, to answer A. B. in a plea of trespass, and that he then have there this precept. By bill. *Law and Markham.*

At which day before our lord the king at *Westminster*, came the said A. B. in his proper person, and offered himself against the said C. D. in the plea aforesaid, and the sheriff, to wit, esq. and esq. on. *Appearance of the plaintiff, and sheriff's return thereon.*

(a) Take the roll and writ to the clerk of the judgments, who will enter the same, and mark the writ, pay 2s. carry in the roll, and file the writ in the treasury. *How to enter it.*

Middlesex (ss) Entry of a bill of *Middlesex* between Docket. A. B. plaintiff, and C. D. defendant returnable on, &c. *Holl. 56.*

This entry will serve for the latitat, enter the writ verbatim, *George* the third, &c. to the end, *Law and Markham.* It will also serve for an attachment of privilege.

By taking out the bill of *Middlesex*, &c. in this manner before the end of the six years, there is no necessity for doing it again, nor is there any occasion to declare thereon pursuant to the rules of court, at the end of two terms. *2 Vern. 192.* For when you come to arrest defendant, and he pleads the statute, it may be continued till the suing out of the new process, which must be shewn in the replication; averring at the end thereof, that the first process sued out and returned, was sued out with a view to exhibit his bill, or declare for the same identical cause of action; and that the same was sued out within the time limited by the statute. *No necessity to do it again, if once taken out. For it may be continued when you sue again. Averment in the replication.*

In actions against peers of the realm, *Scotland* and *Peers. Ireland*, corporations or hundredors on the statutes of hue and cry, &c. an original must be sued out, for avoiding the statute, and returned by the sheriff. And where a member of the house of commons is defendant, the plaintiff must sue out an original writ, and get it returned by

(a) If the writ be produced, to shew it was sued out to save the statute, the plaintiff must also shew it has been returned by the sheriff. *Harris v. Woolford*, 6 Term Rep. 617. So if an alias be produced, the first writ must be returned and shewn. *Vide 2 Ld. Ray. 883. 7 Mod. 3. Willes, 255. 1 Lutw. 260. 2 Bos. and P. 157.*

Officers of
court or pri-
soner.

the sheriff nihil. 2 *Ld. Ray.* 1113. 1 *Lev.* 111. or file a bill and issue a writ of summons thereon, which is to be returned by the sheriff. As against an officer of the court, or a prisoner in actual custody of the marshal, a bill must be filed with the clerk of the declarations, which may be done in vacation to save the statute. *Doug.* 313. 5 *Term Rep.* 173. 325.

If attorney
sues.

If an attorney sue in his own name a common person, he must sue an attachment of privilege, and get it returned by the sheriff, to save the statute; enter it on the roll and file the writ.

ENTRY OF SATISFACTION.

The judgment
roll must be
filed, or cannot
be done.

SATISFACTION being obtained of any judgment, an entry on the record ought regularly to be made to discharge the same, or the judgment apparently continues in force against the party convicted thereon. And for this purpose, the party making satisfaction may demand of the other a warrant of attorney from him, directed to some attorney of the court wherein the judgment is recovered, authorising such attorney to enter up satisfaction; the warrant may be had ready printed at the stationers, the form of which is as follows:

Twenty shil-
ling stamp.

Warrant of
attorney to
acknowledge
satisfaction.

To E. F. G. H. and J. K. attornies of the court of King's Bench at *Westminster*, jointly and severally, or to any other attorney of the same court.

Whereas I, A. B. of, &c. heretofore, to wit, in or about the term of last past, obtained final judgment, in his majesty's court of King's Bench, against C. D. of, &c. for £ and £ costs (or "for £ damages and costs,") as by the record thereof may appear. And whereas I, A. B. have received satisfaction for the same. These are therefore to desire and authorize you the attornies above-named, or any one of you, or any attorney of the same court, to acknowledge, and enter satisfaction upon the record of the same judgment, and for so doing, this shall be your sufficient warrant and discharge in this behalf. In witness I have hereunto set my hand and seal the day of in the year of our Lord 18

Sealed and delivered, (being first duly stamped) in the presence of

N. O.
M. P.

A. B.

Write the satisfaction-piece on a slip of unstamped parchment thus:

Term, in the 57th year of the reign
of king *Geo. III.*

Law and Markham.

Middlesex (ss) Satisfaction is acknowledged between A. B. plaintiff, and C. D. defendant, in a plea of debt (or as the case is) for debt, and damages.

J. G. Attorney.

Judgment entered of
Term, 57th *Geo.* 3.
Roll. 860.

Satisfaction-
piece.

Take this and the warrant of attorney executed to the clerk of the judgments, who will make an entry thereof, in his book of remembrances, and deliver it over to the clerk of the treasury, who enters the same on the roll, pay him 3s. for the entry, if in term: in vacation 6s.; 10d. more for the keys of the treasury, and 3s. 4d. attendance.

Afterwards, to wit on next after in Entry of satisfaction.
term, in the 57th year of the reign of the lord the king, before the said lord the king at *Westminster*, comes the said A. B. by his attorney aforesaid, and acknowledges himself to be satisfied by the said C. D. of the damages, costs, and charges aforesaid (or if in debt "of the debt and damages aforesaid.") Therefore let the said C. D. be there acquitted, &c.

The defendant has been allowed to enter satisfaction on the roll, upon a judgment obtained against him in the King's Bench, on his acknowledging satisfaction for the amount, upon a judgment obtained by him, in the Common Pleas, against the plaintiff for a larger amount, although he had the plaintiff in custody in execution on that judgment. *Simpson v. Hanley and another*, 1 *Maule and Selw.* 696.

A partners' ip or joint debt may be satisfied or discharged by the acceptance of a security, distinct from that of the partnership, or debtors. *Evans v. Drummond*, 4 *Esp. N. P. Rep.* 91. *Reid v. White*, 5 *Esp. N. P. Rep.* 122.

EJECTMENT.

Of the action. THIS is a possessory action, grounded on a right to the possession of the premises in question between the parties; in which action almost all titles to lands are now generally tried, and that, whether the title be to an estate in fee, fee tail, for life, or for years. And the courts now go to the utmost extent in support of ejectments, that people may have specific remedies for their rights. And it was formerly usual for those who had a right of entry into lands, to seal leases thereon, and then the person who next entered on the freehold, was deemed an ejector. And the convenience which arose from this method was, that the title could be tried *toties quoties*; whereas if the plaintiff was barred in an assize, he was put to his writ of right. 6 Co. 7. b. But the court would not permit men to be deprived of their possessions, without an opportunity of defending them. To effect which purpose, they interposed their authority, by establishing a rule, that no plaintiff should proceed in ejectment against such a casual and titular ejector, without *delivering a declaration to the tenant in possession*, and making him an ejector and proper defendant if he pleased, and that he should not have judgment against the casual ejector, unless an affidavit was made, that the tenant was served with a copy of the declaration.

An ingenious fiction for trial of titles.

An ejectment is an ingenious fiction, for the trial of titles to the possession of land. In form it is a trick between two, to dispossess a third by a sham suit and judgment. The artifice would be criminal, unless the court converted it into a fair trial with the proper party. The control the court have over the judgment against the casual ejector, enables them to put any terms upon the plaintiff, which are just. When the tenant in possession asked to be admitted defendant, the court was enabled to add conditions; and therefore obliged him to allow the fiction, and go to trial upon the real merits. 2 Burr. 1294. *Fairclaim v. Shamtitle*.

The nature of the action.

This action is an invention by the court (though fictitious) for the advancement of justice, and to force the parties to go to trial upon the merits, without being entangled in the nicety of pleading on either side. 2 Burr. 668. The plaintiff and defendant are, in the first instance, merely nominal, where there is a tenant in possession; and

the lessor of the plaintiff and the tenant in possession, are substantially and in truth the parties to the suit. *Ibid.* The great advantage of this fictitious mode is, that being under the controul of the court, it may be so modelled as to answer in the best manner every end of justice and convenience: and public utility has adopted it in lieu of almost all real actions; which were embarrassed and entangled with a thousand niceties. But as there was good and bad in the method of real actions, the good ought to be grafted into ejectments, in such manner as to avoid the bad. 3 *Burr.* 1296. *Fairclaim v. Shamtitle.*

An ejectment is a possessory remedy, and only com- A possessory
petent where the lessor of the plaintiff may enter: there- action.
fore it is always necessary for the plaintiff to shew that his lessor had a right to enter; by proving a possession within twenty years, or accounting for the want of it under some exceptions allowed by the statute. Twenty years adverse possession, is a positive title to the defendant: it is not a bar to the action, or remedy of the plaintiff only, but takes away his right of possession. 1 *Burr.* 119. *Taylor v. Atkins.* Every plaintiff must shew a right of possession, as well as of property, and therefore the defendant needs not plead the statute, as in the case of actions. *Ibid.*

The confession of lease, entry, and ouster is sufficient Lease, entry,
to bar a nonsuit for want of proof of actual entry. The and ouster.
meaning of it is, to bring the matter to the mere question of the plaintiff's possessory title. But to avoid a fine, there must be an actual entry, and the demise cannot be carried beyond the actual entry. (a) In all other cases it is sufficient. *Gates v. Wigfall*, 3 *Burr.* 1897. See 7 *Term Rep.* 433. 787.

(a) "I do here enter and take possession of the house," if door be open; if shut, set foot on the groundsel or against the door, and say same words; if to enter on land, "I here enter and take possession of this land." There must be a witness present. 1 *Lill. P. R.* 697. The delivery of a declaration does not amount to an entry to avoid a fine. 1 *Saund.* 319. An entry upon part of the land is an entry into the house. *Cro. Eliz.* 188. pl. 16. and the action must be commenced within a year after entry, or ejectment served. 4 & 5 *Ann. c.* 16.

If brought after fine levied, but before all the proclamations made.

If brought after fine levied by defendant, but before all the proclamations made, it is not necessary to prove an actual entry to avoid such fine; being a fine at common law; but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe v. Watts*, 9 *East*, 17.

The formal title of a trustee shall not in an ejectment be set up against the *cestui que trust*; because from the nature of the two rights, the *cestui que trust* is to have the possession. *Armstrong v. Piers*, 2 *Burr*. 1901.

If recovery, damages nominal.

If the lessor make out his title to the premises, he shall have judgment to recover his term stated in the declaration and damages which are nominal, and shall in consequence have a writ of possession, which the sheriff is to execute by delivering him the peaceable possession thereof. The real damages are afterwards recovered in an action of trespass for the mesne profits, which the tenant has wrongfully received, and which will hereafter be fully treated on.

No distinction between judgment in ejectment on a verdict, and by default.

There is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant; in the last case, it is confessed. 2 *Burr*. 668. *Aslin v. Parkin*.

Must recover according to title.

The plaintiff must recover according to the title. If she demands a half, and she appears to have a third only, she shall recover for such third. If she demands forty acres, she may recover twenty. *Denn v. Purvis*, 1 *Burr*. 329.

No disseisin.

Where an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when the title accrued, and recover the profits from the time of the demise. The entry confessed is previous to the making the lease; but there is no real or supposed re-entry, after the ejectment complained of. If it was considered as a disseisin, no *mesne profits* could be recovered, without an actual re-entry. *Taylor v. Horde*, 1 *Burr*. 111.

Judgment in ejectment is recovery of possession.

A judgment in ejectment is the recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may afterwards appear between the parties. He who enters under it in truth and substance, can only be possessed according to the right, *prout lex postulat*. *Ibid*. 114. If the lessor has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor: and in respect of the freehold, his possession enures

according to right. If he has no title, he is in as a trespasser; and without any re-entry, by the true owner, is liable to account for the profits. *Ibid.*

It is competent to the defendant to shew that the lessor's title has expired, and that he has no right to turn him out of possession. (a)

Defendant to shew the lessor's title expired.

How to proceed on a vacant Possession.

Where a house or land is empty, and the person who was last in possession is run away, so that you cannot find any person to deliver the declaration to, then you must proceed in the old way, by sealing a lease on the premises, and give rule to plead, &c. 1 *Lill. Pract. Reg.* 675. *Sty. Pr. Reg.* 198.

If house or land empty.

It seems, that to warrant these proceedings, the premises must be vacant, deserted by the tenant, and that the landlord is not able to find him to serve the ejectment.

The premises must be vacant, &c.

If there be no actual tenant or occupier of the lands, (except in the case of landlord and tenant, where the landlord has a right of re-entry as upon a lease, where half a year's rent is left unpaid,) the mode of proceeding will be by sealing a lease on the premises; and it is first necessary that the claimant do take possession of the lands, by making a formal entry thereon, to empower him to constitute a lessee for years; and being in possession of the soil, he, there on the land, seals and delivers a lease for years to such lessee, and having thus given him entry leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh, and ousts him, or till some other (either by accident or agreement beforehand) comes upon the land, and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or the casual ejector, whichever it was that ousted him, to recover back his term and damages.

How to proceed if no tenant in possession (except under the 4 Geo. 2.)

How to deliver the lease

(a) The legal title must prevail. *Goodtitle v. Jones*, 7 *Term Rep.* 47. If there be a plea of ancient demesne, it must be pleaded within the four days, and see *Burr.* 1046. what affidavit will be requisite to support it. *Doe v. Roe, dem. Rees.*

Explanation.

Supposing A. to be the person claiming title to the premises, he may, if he pleases, sign the following letter of attorney to empower D. to execute a lease in his name of the premises in question to E. F. which is done upon the premises, D. and E. F. being only thereon: then D. after having executed his lease to E. F. leaves him in possession of the premises, who is turned out by G. H. to whom, whilst on the premises, E. delivers a declaration in ejectment.

The form of the letter of attorney, if requisite.

Know all men by these presents, that I, A. B. of, &c. gentleman, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint C. D. of, &c. hosier, to be my true and lawful attorney, for me, and in my name to enter into and take possession of a certain messuage late in the tenure and occupation of G. F. and J. H. situate and being in the parish of, &c. in the county of Oxford, but now untenanted, and after the said C. D. hath taken possession thereof, for me, and in my name, and as my act and deed, to sign, seal, and execute a lease of the said premises with the appurtenances, unto E. F. of the parish of, &c. maltster, to hold the same unto the said E. F. his executors, administrators, and assigns, from the day of last past, before the date hereof, for the term of five years, at the yearly rent of a pepper-corn (if lawfully demanded), subject to a proviso to make void the same on payment by me of the sum of sixpence to the said E. F. his executors or administrators. In witness, &c.

The lease.

This indenture made, &c. between A. B. of, &c. gentleman, of the one part, and E. F. of, &c. of the other part, witnesseth, That the said A. B. for and in consideration of the sum of 5s. of lawfull money of Great Britain, to him in hand paid by the said E. F. at or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, hath demised, granted, and to farm let, and by these presents doth demise, grant, and to farm let, unto the said E. F. his executors and administrators, all that messuage, &c. situate and being in the parish of in the county of Oxford, late in the possession of G. F. but now untenanted, to have and to hold the said messuage and premises hereby demised, with the appurtenances, from the day of last past, before the date hereof, for and during and unto the full end and term of five years from thence next ensuing, and fully to be complete and ended, yielding and paying therefore yearly and every year

during the said term, unto the said A. B. or his assigns, the rent of one pepper-corn, if lawfully demanded, at the feast of Provided always, and
 upon this condition, that if the said A. B. shall at any time or times hereafter tender or cause to be tendered to the said E. F. his executors or administrators the sum of 6d. that then and in such case, and from thenceforth, this present indenture shall be void, and of none effect (any thing herein contained to the contrary in any wise notwithstanding). In witness whereof the parties hereto have interchangeably set their hands and seals the day and year first above written. (a)

Sealed and delivered as the act and deed of the above named A. B. by C. D. of in the county
 of hosiery, by virtue of a letter of attorney to him for that purpose made by the said A. B. bearing date the day of
 instant, being first duly stamp in the presence of, &c.

If no Letter of Attorney be made.

If there be no letter of attorney made, then the owner of the land must go upon it, before the essoign day of the term, and there seal and deliver a lease to a friend of his as tenant, and at the same time deliver him possession of the premises. This being done, get another person (a friend) to go upon the premises, and turn out the tenant by thrusting him off the premises, and afterwards let such ejector remain on the premises, and whilst he continues there, serve him with a declaration in ejectment, in which make the tenant or lessee the plaintiff, the landlord the lessor, and the actual ejector the defendant, and declare on the demise in the lease, and write a notice at the foot of the declaration, to appear and plead as hereafter.

If no letter of attorney, how to seal the lease.

The declaration is the same as others, only instead of *John Doe* and *Richard Roe*, the plaintiff and defendant are, in this case, the real persons; as for instance, E. F. the lessee of the premises, will be plaintiff, and G. H. the defendant; A. B. will be the lessor of the plaintiff; and instead of the common notice at the end, put this:

Take notice, that unless you appear to this declaration, in his Majesty's court of King's Bench, at Westminster, Notice to appear.

(a) A person executing a deed for his principal under a power of attorney, should sign it in the name of the principal. 6 Term Rep. 176.

If in town,
say, "first
day of."

next Michaelmas term, at the suit of the above named plaintiff, E. F. and plead thereto, judgment will be thereon entered against you by default. Yours, &c. G. H.

After service make the following affidavit of executing the letter of attorney, of sealing the lease, and the ouster by the defendant:

E. F. on the demise of A. B. plaintiff.
In the King's Bench. and
G. H. defendant:

Affidavit.

J. K. of, &c. gentleman, maketh oath, and saith, That he was present and did see C. D. in the letter of attorney hereto annexed, duly sign, seal, and deliver the said letter of attorney: and this deponent further saith, that on the day of last past, he this deponent, did see the said C. D. in the letter of attorney hereto annexed, named, for and in the name of A. B. the lessor of the plaintiff, enter upon and take possession of the messuage (a) in the lease hereto also annexed, mentioned, by entering on the threshold of the outer door thereof, and putting his finger into the key-hole of the door of the said messuage, the same being locked up and uninhabited, so that no other entry thereon could be made, nor any possession thereof taken, without force. And this deponent further saith, That he did, on the same day, see the above-named C. D. after such entry made, and whilst he stood on the threshold of the said door, duly sign and seal the lease hereunto annexed, in the name of the said A. B. and as his act and deed deliver the same unto the said E. F. the plaintiff above-named; and that after the said lease was so executed, this deponent did see the said E. F. take possession thereof by virtue of the said lease, by entering upon the threshold of the said outer door of the said messuage, and putting his finger into the key-hole of the said door, (the same being then locked and uninhabited,) so that no other entry could be made thereon (save as aforesaid), and that immediately afterwards the said G. H. the defendant, came and removed the said E. F. from the said door, and put his foot on the threshold thereof; whereupon this deponent did, on the day and year aforesaid, deliver to the said defendant G. H. who still continued upon the threshold of the said messuage,

(a) If there be more houses than one, then you must go to each house, and seal and deliver the lease.

a true copy of the declaration of ejectment, and notice thereunder written hereto annexed.

After this is sworn endorse it, "to move for judgment against the casual ejector;" and unless the defendant appears and enters into the common rule, sign judgment, as on a common ejectment, counsel 10s. 6d. to move, rule for judgment 7s. Moving for judgment.

In cases of a vacant possession, no person claiming title will be let in to defend, but he that can first seal a lease, must obtain possession, *Bull.* 96. *Rarn.* 177; and no defence can be made by the defendant who is the real ejector, and the other persons claiming a title were refused a rule to be admitted to defend. *Ibid.* *Ex parte Beauchamp and another.* No person can be made a defendant.

Of Notice to quit previous to Ejectment.

Where the tenant holds the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe, that demises, where no certain term is mentioned, are held to be tenancies from year to year, which neither party can determine, without reasonable notice to the other. This notice is, in most counties, six months preceding that part of the year when the tenancy commenced: and therefore it hath been holden, that half a year's notice to quit possession, must be given to such tenant, before the end of which time the landlord cannot maintain an ejectment, (unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant, in which case no notice is necessary.) And the same law will apply to the executor of such a tenant, 3 *Wils.* 25. But after the expiration of a lease for a certain term, the tenant continuing in possession is deemed a trespasser: and therefore an ejectment, which is an action of trespass, may be brought without any notice to quit. When notice to quit requisite, and when not.

On a motion for a new trial in ejectment, the case was turned on the sufficiency of the notice to quit, which was as follows: "I desire you to quit the possession, at Lady day next, &c. or I shall insist upon double rent for the same." Verdict for plaintiff. Lord *Manafield*. If the words had been "or else that you agree to pay double rent," the ejectment could not have been supported; but here the landlord does not offer a new bargain, the additional words only prove the landlord's anxiety to get into When no notice is requisite.

possession. The notice clearly means to refer to the statute, although the penalty given by the statute is not double rent, but double the yearly value, which is more favourable to landlords; for double rent would be no penalty on the expiration of some leases. It is an emphatical way of enforcing the notice, and shewing the tenant that he is in earnest, by informing him of the legal consequence, if he held over. *Doe v. Jackson and others*, *Dougl. Rep.* 167.

If a demise be for one year and no longer.

A demise for one year, and no longer, a notice to quit is not necessary at the end of the year to put an end to the tenancy. But a demand of possession is necessary in order to entitle the plaintiff to double the rent—or value. The demand need not be made for that purpose on or before the expiration of the term, but may be made afterwards. *Cobb v. Stokes*, 8 *East*, 361.

Where an agreement is for the life of A. and a power for his son to have it, he must elect in a reasonable time.

(a) If a tenant holds under an agreement for a lease, at a yearly rent, whereby it is stipulated, that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, given the lessor's son power to take the house for himself, when he comes of age, the son must make his election in a reasonable time, after he comes of age. 2 *Term Rep.* 436, *Doe v. Smith*. The delay of a year is unreasonable, and the tenant cannot be ejected upon half a year's notice to quit, served after such a delay, *ibid.* If he had elected in a week or a fortnight, it would have been reasonable.

Landlord may enter at the end of the term.

The landlord has a right to enter on the expiration of the term, though if he do it with a strong hand to dispossess the tenant by force, he may be indicted. 7 *Term Rep.* 481.

If remainderman accepts rent.

If the remainderman accept rent, as rent, after the death of the tenant for life, it is an admission that the defendant is his tenant, and the tenant is entitled to notice to quit. *Doe v. Watts*, 6 *Term Rep.* 83.

Acceptance of rent due before expiration of notice to quit.

If a notice be given to quit on a certain day, and afterwards an acceptance of rent accrued due *before* the expiration of such notice, the notice remains good. 1 *Term Rep.* 161, in n. But if the landlord receive rent due *after*

(a) If there be a lease for a year, and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit release of the contract. *Right v. Darby*, 1 *Term Rep.* 162.

the expiration of such notice, it is a waiver. 6 *Term Rep.* 219.

If a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, he is entitled to double rent. *Messenger v. Armstrong*, 1 *Term Rep.* 53, and a second notice delivered to the tenant after the expiration of such notice, to quit, on a subsequent day, or to pay double rent, is no waiver of such first notice, or of the double rent, which has accrued under it. *Ibid.* When double rent.

A tenant from year to year, before a mortgage or grant of the reversion, is entitled to six months notice to quit, before the end of the year from the mortgagee or grantee. 1 *Term Rep.* 380. *Birch v. Wright*. Tenant before a mortgage.

By the custom of London, if the premises are above the yearly rent of 40s. half a year's notice must be given to quit; if under 40s. a quarter's notice. 2 *Sid.* 20. Custom of London.

Defendant held from Michaelmas, and he was served with notice to quit at Midsummer; but when he received this notice, he made no objection that it required him to quit at that period of the year, but merely said, "I pay rent enough already, and it is hard to use me thus." Verdict for plaintiff. Motion to set it aside: Court were of opinion, that the defendant had not waived the objection, and made rule absolute to enter a nonsuit, as the verdict was taken with liberty to move to set it aside and enter a nonsuit. *Oakapple dem. Green v. Copous*, 4 *Term Rep.* 361. Insufficiency of notice may be made at the trial.

If a man makes a will, and appoints three executors, notice to quit a leasehold property by two out of the three is bad, although the notice stated as given on behalf of themselves and the third executor, and his joining in the ejectment, is not evidence, of his original assent, to bind the tenant by the notice. This was on a lease for 21 years, determinable at the end of the first seven or fourteen years, at the option of landlord or tenant by giving six months previous notice. *Right demise Fisher v. Cuthell*, 5 *East*, 491. See *Cro. Eliz.* 803. Notice by two executors out of three to whom the land was devised, bad.

There is no distinction between houses and lands as to the time of giving notice to quit. 1 *Term Rep.* 162.

A notice delivered at Michaelmas 1795, to quit at Lady-day which will be in the year 1796, is good notice to quit at Lady-day 1796. 7 *Term Rep.* 63. *Doe v. Knightly*.

Lessor seized in fee of the premises in question. On

No distinction between houses and lands.
If there be a mistake in the year.
When there must be half a year's notice to quit.

11th May, 1781, defendant took the house from that time under a parol demise at 10l. per annum, the rent to commence at Midsummer following. The defendant *Darby* let part to the defendant *Bristow*; 26th March, 1785, the defendant *Darby* was served with notice to quit on the 29th of September following. Ejectment brought, and verdict for the plaintiff, subject to the opinion of the court.—Question, Whether the rule, which requires that half a year's notice should be given to a tenant at will before ejectment can be brought, requires also, that such notice should expire at the end of the year? Lord *Mansfield*—When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary: because both parties are equally apprised of the determination of the term. If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year; but then it is necessary, for the sake of convenience, that if either party should be inclined to change his mind he should give the other half a year's notice before the expiration of the next or any following year. As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement may be for a month or less time, and there much shorter notice would be sufficient, where the tenant has held over the time agreed upon than in the other case. Mr. J. *Buller*—There should have been half a year's notice to quit before the end of the term. *Right v. Darby*, 1 *Term Rep.* 160. Judgment for defendant. Vide 2 *Salk.* 413. 13 H. 8. 15. b. Upon the expiration of a lease, if the landlord receive subsequent rent, the tenant is warranted in holding over, and becomes tenant from year to year, and is entitled to notice to quit.

Lease determinable, &c. no notice.

On expiration of lease if landlord receive subsequent rent.

Where a second notice to quit was no waiver of the first notice.

A landlord gave notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment. The court held the second notice was no waiver of the first. *Doe v. Williams*, 2 *East*, 237.

Lands held from Candle-

The defendant held a farm as to arable lands from Can-

dlemas, as to the buildings and pastures from May-day, the rent payable at Michaelmas and Lady-day, and notice to quit was given six months before May-day, but *not* six months before Candlemas. Lord Kenyon nonsuited plaintiff. *East*, 384. cited; he said, the notice must be given half a year before Candlemas. mas, residue from May-day.

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. 2 *Term Rep.* 159, *Maddox v. White and others*. Infant to give notice.

On trial of ejectment before *Heath, J.* it was admitted, that defendant was tenant from year to year to lessor, and the question was, whether he had been served with due notice to quit? It appeared that the notice had been served on his *maid-servant at his house not situated on the demised premises*, and the contents explained to her at that time; but there was no evidence that it ever came to defendant's hands, except as above. A nonsuit was entered, with leave to move to set it aside. *Lord Kenyon*—This is different from the cases of personal process. If an ejectment be served on the wife in the house, it is sufficient. But in every case of the service of a notice, leaving it at the dwelling-house of the party has always been deemed sufficient. So wherever the legislature has enacted, that before a party shall be affected by any acts, notice shall be given to him, leaving that notice at his house is sufficient. So also in the case of an attorney's bill or notice of a declaration being filed; and indeed in some instances of process leaving it at the house is sufficient, as a *subpoena* or *quo minus*. In general the difference is between process to bring the party into contempt, and a notice of this kind; the former of which only need be personally served on him. *Buller, J.* *Ex concessis*, personal service is not necessary in all cases; it was proved that this notice was delivered to the tenant's servant at the dwelling-house of the tenant, and its contents were explained at the time: and that the servant, who was in the power of the defendant, was not called to prove that she did not communicate the notice to her master: this was ample evidence, on which the jury would have presumed that the notice reached the tenant. Rule abs. *Jones dem. Griffiths v. March*, 4 *Term Rep.* 464. Notice delivered to servant at the dwelling of tenant, and explained at the time, is good, without shewing it came to the master.

If a landlord lease for seven years, by *parol*, and agree that the tenant shall enter at Lady-day, and quit at Candlemas, though the lease be void by the statute as to the When the landlord cannot put an end to the tenancy

but by notice to quit. duration of the term, the tenant holds under the lease in other respects, and therefore the landlord can only put an end to the tenancy at Candlemas. *Doe v. Bell*, 5 *Term Rep.* 471.

Notice served on one of two tenants under a joint demise. A notice to quit served on one of two tenants who held under a joint demise, is evidence that the notice reached the other who lived elsewhere. *Doe v. Watkins*, 7 *East*, 552.

A landlord about to sell gave notice to quit, but promised if he did not sell, tenant should remain till he sold.

A landlord, about to sell, gave notice to quit on 12th Oct. 1806, but promised not to turn him out unless sold; and not being sold till Feb. 1807, tenant refused to deliver up possession: on ejectment brought, it was held that the promise which was performed was no waiver of the notice. *Whiteacre dem. Boulton v. Symons*, 10 *East*, 13.

Lease since new style. Notice to quit at style bar.

A lease of lands by deed since the *new* style, to hold from the feast of St. Michael, must be taken to mean from *New Mich.* and cannot be shewn by extrinsic evidence to refer to a holding from Old Mich.; and a notice to quit at Old Mich., though given half a year before New Mich. is bad. *Doe d. Spicer v. Lea*, 11 *East*, 312.

If house and land let together, to be entered upon at different times.

Where a house and land are let together to be entered upon at different times; and it do not appear from the terms of the demise, from *what time*, the whole is to be taken as let together; it is a question of fact for the jury, which is the principal, and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in due time. *Doe d. Heapy v. Howard*, 11 *East*, 408.

Receiver in Chancery may give notice to quit.

A receiver appointed by the court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies, by a regular notice to quit. *Doe d. Marsack v. Read*, 12 *East*, 57.

Notice to quit at Michaelmas, served personally, is prima facie evidence for jury to bind the tenancy.

A notice to quit at Mich. served personally on the tenant, who made no objection at the time, is *prima facie* evidence, from whence the jury may find the tenancy commenced at that period. *Doe d. Clarges, v. Foster*, 13 *East*, 405. It appeared that no question was asked of the witness whether he read the notice or not at the time. If he did not look at the notice, that would have rebutted the idea of his acquiescence as to the time stated for his quitting.

Where tenant from year to year, underlet a part, and

Where a tenant from year to year under-let part of the premises, and then gave up to his landlord the part remaining in his own possession; without either

receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole (supposing that any thing short of a regular notice to quit from the landlord to his immediate tenant, would after such sub-letting, have determined the tenancy in the whole;) yet the landlord cannot entitle himself to recover against the sub-lessee (there being no privity of contract between them) upon giving half a year's notice to quit in his own name, and not in the name of the first lessee: for as to the part so under-let the original tenancy still continued undetermined. *Pleasant dem. Hayton v. Benson*, 14 East, 234.

then gave his part up to the landlord without a notice to quit, or a notice to his sub-lessee, or surrendering that part in the name of the whole, is not entitled to recover of the sublessee on half a year's notice in his own name.

Where a farm was leased for twenty-one years at a rent of 180l. consisting, as described in the lease, of the *Town Barton*, and its several parcels, described by name at the rent of, &c. with a power reserved to either party to determine the lease at the end of fourteen years on giving two years previous notice; held, that a notice by the landlord to his tenant to quit, "*Town Barton, &c. agreeable to the terms of the covenant between us on the expiration of the fourteen years of your term,*" given in due time is sufficient. *Doe d. Rodd v. Archer*, 14 East, 245.

Farm leased for twenty-one years with a covenant to determine at fourteen years, what notice is sufficient to determine the lease.

A notice to quit a part only of premises leased together is bad. *ib.* To quit part bad.

A proviso in a lease for twenty-one years, that if either of the parties shall be desirous to determine it in seven or fourteen years, it shall be lawful for either of them, his executors or administrators, so to do upon twelve months notice to either of them, his heirs, &c. extends, by reasonable intendment, to the devisee of the lessor, who was entitled to the rent and reversion. *Roe dem. Bamford v. Hayley*, 12 East, 464.

Proviso to determine at the end of seven or fourteen years on twelve months notice, a devisee may give such notice.

One who is put in possession upon an agreement for the purchase of land, cannot be ousted by ejectment before his lawful possession is determined by demand of possession, or otherwise, and even considering such lawful possession as a tenancy at will, the defendant's confession (by entering into the common rule,) of a lease by the lessor to the nominal plaintiff, is not a conclusive determination of the will, whereon to maintain the ejectment. *Right dem. Lewis v. Beard*, 13 East, 210.

If one be put into possession of land under an agreement on the purchase, he cannot be ousted before his lawful possession is determined.

For what an Ejectment lies.

For what it
lies.

Ejectment lies for a manor, messuage, so many acres of land, meadow, pasture, wood, &c. 11 Co. 55. So *de una domo*, 2 Cro. 654. *de cotagio*, Cro. Eliz. 818. *de coquind*, Noy, 109. *de stabulo*, 1 Lev. 58. *de romea*, 3 Leo. 210. of the part of a house, if it appear what part, *Str.* 696. of part, as *locum vocatum*, a passage room, and ascertained in what part, *Ld. Raym.* 1470, of a close of pasture called five acres, containing five acres, *Ibid.* of tithes, and *portione decimarum*, *Hard.* 57. of pasture for one hundred sheep. *Dal.* 95. For common of pasture generally, if joined with lands, will be good after verdict *Str.* 54. Of a coal-mine. 2 Cro. 150. It lies by the owner of the soil for land, part of the highway. 1 Burr. 133. Land is a sufficient description, though part of a house is built by encroachment upon it, for plaintiff claims the land not the nuisance. *Ibid.* Of a kitchen, Noy, 109. a bed-chamber or lodging room, by the name of one room in such a house, in the middle story of the said house, 3 Lev. 210. of an apple-loft or store-house. Cro. Eliz. 854. Cro. Car. 614. 1 Lev. 58. By the owner of the soil, for land which is part of the king's highway, or of an acre of land, described only by the name of land, though there was a wall and porch, and part of a house built upon it. *Goodtitle v. Alker*, 1 Burr. 133. But it does not lie without shewing the quantity and quality of the land, and how many acres of land, meadow, and pasture, &c. 11 Co. 55. 1 Salk. 254. 4 Mod. 97. It does not lie *de rivulo*, or *aquæ cursa*; for it must be so many acres of land, *aqua coopert.* *Yelv.* 143. nor *de pannagio*. 1 Lev. 213. It does not lie for a messuage or tenement, 1 *Ld. Ray.* 191. 3 Mod. 238. 3 Wils. 23. nor for a messuage and two tenements, *Doe v. Plowman*, 1 East, 441. even after verdict, the case of *Doe v. Denton*, 1 Term Rep. 11. passed by surprise. An ejectment *de uno tenemento* will not lie. *Str.* 834.

For what it
does not lie.

If brought by
one in forma
pauperis.

If an ejectment be brought in *forma pauperis*, if there be vexatious delay, he may on motion be dispaupered. 6 East, 505. *Doe v. Trussel.*

Tenant by
elegit.

A tenant by *elegit*, cannot maintain this action against the tenant in possession, who has a lease prior to his judgment. *Doe v. Wharton*, 2 Term Rep. 2.

How to proceed if Tenant be in Possession.

Where there is a tenant in possession, no actual lease is made, entry or ouster by the defendant, but all are merely ideal, for the sole purpose of trying the title; therefore, in order to proceed against him, prepare a declaration, engross it on a 4d. stamp paper, the copy of which, "upon stamp," you serve the tenant with; if there be more than one tenant, each must be served with a copy, but if the man is not at home, his wife will do (provided she was served on the premises, or at the dwelling-house, or residence of the husband, (a) and so sworn to); this is necessary both in town and country causes. At the time of service, in all cases, it is requisite to read over or explain the notice at the foot of the declaration to the person served, affidavit of which is required.

Where there is a tenant in possession no lease, &c. is made, and how to proceed.

(a) 6 Term Rep. 765.

If a tenant's son, daughter, or servant, be served (the tenant being out of the way), it will not do, unless it appear on the affidavit, that such declaration came to the tenant's hands in time. (b) And it should also appear that he was acquainted with the meaning thereof; also that all endeavours have been made to see him, but without effect.

Tenant's son, &c.

In case the servant, &c. be served, and motion be made that it be deemed good service, the tenant must swear that the declaration never came to his hands before the time of shewing cause, or the court will make the rule absolute. *Doe v. Roe, Trin. 30 Geo. 3.* In this case, to ground such a motion, you must shew endeavours to serve him at several times, &c. Declaration tendered to servants, who refused to call their master, or receive it, saying they had no orders to take any papers; motion that leaving it at the house might be sufficient, which was ordered. *Douglas v. ———, 1 Str. 575. Cas. temp. Hard. 164.*

In case servant be served.

Tenant and wife both kept out of the way to avoid the service of ejectment, and it was served on the servant in

Where both kept out of the way.

(b) Service on the daughter, in the absence of tenant and wife if it do not appear by the affidavit, that the tenant received it before the *essoign day*, it will not be sufficient for the rule. *Roe d. Hanbrook v. Doe, 14 East, 441.*

Any thing that is special in the service.

the house of the tenant; the court granted a rule to shew cause why it should not be deemed good service. 2 Burr. 1181. *Method v. Norright*. Where there is any thing special in the service, it should be mentioned to the court on the motion for judgment against the casual ejector, who may make the rule absolute in the first instance. 1 Str. 575. 2 Burr. 1116—1181. 1 Black. Rep. 290—317. or to shew cause.

Tenant may be served any where.

The tenant himself may be served any where, but it must appear by the affidavit, that he is the tenant, *Doe ex dem. Robinson v. Roe*, T. 35 Geo. 3. If the tenant, or his wife, refuse to receive the declaration, leave it for them on the table, or chair in the house, or throw it down, and explain the contents.

To quit 25th of March, or 8th April.

A notice to quit the 25th March, or the 8th of April good. *Doe v. Wrightman*, 4 Esp. N. P. Cas. 5,

Tenant in possession being personated at the time of service by another, who accepted the service in her name, this deemed good service on the tenant herself. 1 H. Bl. 644.

Motion on behalf of lessor, why the service of the ejectment made on a woman who said her name was *Margaret Campbell*, at the time when it was served upon her at *Margaret Campbell's* house, should not be deemed good service upon the said *M. C.* herself; and why the lessors should not have leave to sign their judgment against the casual ejector on Wednesday next in default of her appearance; and that the leaving a copy of the rule at the house of said *M. C.* with the same person there; or if no one could be met with affixing a true copy of it on the door thereof; should be deemed good service thereof on the said *M. C.* on an affidavit that *M. C.* was not at home, or (if at home) was denied; and that her servant maid was at home, but could not be served, whereupon a copy of the rule was fixed on the door of the house; and that at a subsequent day, the maid being at home, and opening the window, but refusing to open the door, and denying that her mistress was at home, another copy was affixed on the door, and the maid was told the effect of it; and another copy was thrown in at the window, and the original rule was shewn to the maid. Rule abs. *Fenn v. Denn*, 2 Burr. 1181. 1 Black. Rep. 290. 317.

If tenant absconds.

If the tenant abscond or keep out of the way, to avoid being served, a copy of the declaration should be delivered to one of his family, or if there be no one in possession, it may be affixed on some part of the premises.

When to be served, and of the Notice.

It is to be served *before the essoign day of every term*, When to be either in town, or country; and in town the notice must be served.

be made to appear in the next term after delivery; but the delivery on a *Sunday*, or on the essoign day of that term wherein the defendant is to appear, will not do.

In country ejectments, it is said, the notice if made in the issuable term, as *Hilary* or *Trinity*, 7 Term Rep. 469. If a country ejectment, and notice to appear in Michaelmas or Easter term. But if a country ejectment should be served on the tenant to appear in *Easter* or *Michaelmas*, or *Easter* term, the plaintiff must make his motion for judgment in *that term* he has made the notice for appearance, or he can have no rule for judgment, unless on special application to the court. *Salk.* 257. He may now have a judge's order.

If the premises be in *London* or *Middlesex*, the notice must be made to appear the first day of the next term, after service; for if made generally, the tenant in possession has the whole term to appear in; but if the tenements lie in any other county, the notice must be to appear as of the term *generally*. When to make the notice to appear in London. Country.

The court will permit the notice to be amended, by making it to appear in *Hilary* term instead of *Michaelmas*. Notice may be amended. *Doe v. Roe*, 7 Term Rep. 469.

Easter term, in the 57th year of the reign of king *George* the third.

Law and Markham.

Middlesex (a) to wit. *John Doe* complains of *Richard Roe*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself; For that whereas, *John Charles*, on the second day of *April*, in the 57th year of the reign of our lord the now king, at *Westminster* in the said county, had demised, granted, and to farm let to the said *John Doe*, two messuages, two barns, two stables, two orchards, fifty acres Declaration in ejectment by bill.

(a) The venue is local, and therefore must be laid where the lands lie; therefore if venue be laid in *Farnham*, and it is proved to be in *Farnham Royal*, it is not fatal, unless it be shewn that there are two *Farnhams*. *Doe dem. Tollet v. Salter*, 13 East, 9.

of arable land, fifty acres of meadow, fifty acres of pasture, twenty acres of wood, and twenty acres of furze and heath, with the appurtenances, situate, lying, and being in the parish of *St. Clement's Danes*, in the county aforesaid, to have and to hold the said tenements, with the appurtenances, to the said *John Doe* and his assigns, from the first day of *April* in the year aforesaid, for and during, and unto the full end and term of five years, from thence ensuing, and fully to be complete and ended; by virtue of which said demise the said *John Doe* entered into the said tenements, with the appurtenances, and became and was possessed thereof, and being so possessed thereof, the said *Richard*, afterwards, to wit, on the said 2d day of *April*, in the 57th year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, which the said *John Charles* demised to the said *John*, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *John* out of his said farm, and other injuries to him then and there did, against the peace of our said lord the now king, to the damage of the said *John Doe* of 10l. and therefore he brings suit, &c.

A. B. attorney for plaintiff.

Pledges to prosecute

{ *John Doe*,
and
R. Roe.

Mr. Richard Roe,

Notice.

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof; and I being sued in this action as casual ejector, and having no claim or title to the same, do advise you to appear (b) the first day of next *Trinity* term, in his majesty's court of King's Bench at *Westminster*, (if it be by bill); if by original, say, "*King's Bench wheresoever he shall then be in England*," by some attorney of that court; and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,
Richard Roe.

The not subscribing the name of the casual ejector at the foot of the notice, is no ground of application to

(b) If in the country, say, "next Hilary term," and leave out the "first day."

et aside the proceedings for irregularity. *Hazlewood v. Thatcher*, 3 Term Rep. 351.

Easter term, in the 57th year of the reign of king George the third.

Law and Markham.

London (ss) *Richard Roe*, late of *London*, yeoman, The like by
was attached to answer *Jon Doe*, in a plea, wherefore, original.
with force and arms, &c. he entered into five messuages,
and one acre of land, with the appurtenances, in the
parish of *Saint Dunstan* in the *West*, in the said city,
which *John Sibthorp* demised to the said *John Doe*, for
term not yet expired, and ejected him from his said
farm, and other wrongs to him did, to the great damage
of the said *John Doe*, and against the peace of our
sovereign lord the now king; and whereupon the said
John Doe, by G. G. his attorney, complains: for that
whereas the said *John Sibthorp*, on the 2d day of *April*,
in the 57th year of the reign of his said majesty, at the
parish aforesaid, had demised to the said *John Doe*, the
said tenements, with the appurtenances, to have and to
hold the said tenements, with the appurtenances, to the
said *John Doe*, and his assigns, from the first day of
April then last past, to the full end and term of five
years, from thence next ensuing, and fully to be com-
plete and ended, by virtue of which said demise the
said *John Doe* entered into the said tenements with the
appurtenances, and was possessed thereof; and the said
John Doe being so possessed thereof, the said *Richard*
Roe, afterwards, to wit, on the said 2d day of *April*, in
the 57th year aforesaid, with force and arms (that is to
say), with swords, staves, and knives, entered into the
said tenements, with the appurtenances, which the said
John Sibthorp demised to the said *John Doe*, in manner
aforesaid, for the term aforesaid, which is not yet ex-
pired, and ejected the said *John Doe* out of his farm,
and other wrongs, &c. to the grievous damage, &c. and
against the peace, &c. whereupon the said *John Doe*
saith that he is injured, and hath damage to the value of
£1. and therefore he brings suit, &c.

Mr. T. G. I am informed that, &c. (as in the notice Notice,
by bill.)

The best way is to proceed by original; as you prevent
the defendant from bringing a writ of error (unless in
parliament), and the declaration on a single demise is
printed and sold at the stationers in blanks already
stamped; and in case there should be wanted one on a
double demise, it will be as follows:

The best way
is to proceed
by original.

Declaration by
original on
a double de-
mise by origi-
nal.

Staffordshire (ss) Richard Roe, late of *Stafford*, in the county aforesaid, yeoman, was attached to answer *John Doe*, in a plea, wherefore with force and arms he entered into one messuage, one orchard, one garden, seventy acres of land, seventy acres of pasture, and seventy acres of meadow, with the appurtenances, in the parish of F. in the said county, which J. G. demised to the said *John Doe*, for a term of years which is not expired; and also wherefore with force and arms he entered into one other messuage, one other orchard, one other garden, &c. (as before), with the appurtenances, in the parish of F. in the said county, which T. P. demised to the said *John Doe* for a term which is not yet expired, and ejected him from his said several farms and other wrongs to him then and there did, to the great damage of the said *John Doe*, and whereupon the said *John Doe*, by J. K. his attorney, complains: that whereas the said J. G. on the 14th day of *February*, in the year of our Lord 1817, at the parish of F. aforesaid, in the county aforesaid, demised to the said *John Doe* the said tenements first above-mentioned, with the appurtenances, to have and to hold the same to the said *John Doe*, from the 13th day of *February* then last past to the full end and term of seven years from thence next ensuing, and fully to be complete and ended. And also whereas the said T. P. on the 14th day of *February*, in the year of our Lord 1817, at the parish of F. aforesaid in the said county, demised to the said *John Doe* the tenements aforesaid, secondly above-mentioned, with the appurtenances, to have and to hold the same to the said *John Doe*, from the 13th day of *February* then last past, to the full end and term of seven years from thence next ensuing and fully to be complete and ended: by virtue of which said several demises the said *John Doe* entered into the said several tenements, with the appurtenances, and was possessed thereof, and being so possessed thereof, he the said *Richard Roe* afterwards, to wit, on the said 14th day of *February*, in the year aforesaid, with force and arms, &c. entered into the said several tenements, with the appurtenances, which the said J. G. and T. P. have respectively demised to the said *John* in manner and for the several terms aforesaid, which are not yet expired, and ejected the said *John Doe* out of his said several farms, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon the said *John Doe* says he is injured, and hath sustained damage to the value of 10l. and there-

Second count.

fore he brings suit, &c. Add the notice at the end as before, to appear generally as of the term, leaving the words "the first day of" out; wheresoever the king shall then be in *England*.

How to describe the Premises if a Rectory, &c.

If it be a rectory, say, he entered into the rectory of Rectory. the parish church of O. in the county of C.; and also into two messuages, ten barns, ten outhouses, ten gardens, ten orchards, fifty acres of arable land, fifty acres of meadow land, fifty acres of pasture land, and fifty acres of other land, with the appurtenances, situate and being in the said parish of O. in the county of C. aforesaid: and also into all and singular the tithes of corn, grain, hay, wood, grass, wool, lambs, and calves, arising, growing, renewing, increasing, and happening, within the said parish of O. and within the bounds, limits, and titheable places of the said rectory.

In an ejectment for a rectory or vicarage, you must shew a demise to be made by deed, though no lease is actually made, as thus: for that whereas the said *John Beech*, on the 13th day of *February*, in the year of our Lord 1812, at the parish of C. in the county aforesaid, by his indenture sealed with his seal, and to the court of our lord the king now here shewn, bearing date the day and year aforesaid, had demised, &c.

For a rectory or vicarage, must shew demise by deed.

If it be of a manor, the description of the premises is Manor. thus: entered into the manor of F. in the said county, with the rights, members and appurtenances thereunto belonging, and into fifty messuages, fifty cottages, fifty barns, fifty stables, two mills, fifty gardens, fifty orchards, 3000 acres of pasture land, 3000 acres of meadow, 1000 acres of wood, 500 acres of marsh land, 500 acres of furze and heath, and common of pasture for all manner of cattle, with the appurtenances, in the parish of F. in the said county. If tenants in common are lessors, there ought to be a different count on the demise of each: for they cannot make a joint lease. 2 Wils. 232. But in the case of joint-tenants, each may be said to demise the whole. So of coparceners. *Vide Bull. N. P. 107.*

In this declaration the law requires, that the thing demanded be so specified, that the sheriff may certainly know what to give the possession of, if plaintiff should recover: for it would be in vain if execution could not

The thing demanded to be stated with certainty.

be had of the thing specifically demanded. 2 *Ld. Rayn.* 1480. 2 *Str.* 907. But such a very exact description is not equally necessary in this action as in a *præcipe*; for in this action the plaintiff is to shew the sheriff the premises, and take possession at his peril of only what he has title to; if he takes more, the court will in a summary way set it right. 1 *Burr.* 629. *Coffingham v. King.*

In what County to be brought, and of the Demise. (a)

In what county to be brought. Day of the demise.

It must be brought in that county where the lands lie, and the declaration must set forth the particular parish; and the day of the demise must be laid after the title accrues, otherwise plaintiff will be nonsuited, and the plaintiff must lay the commencement of his supposed lease, to have been precedent to the ejectment by the defendant. 1 *Sid.* 8. 2 *New Abr.* 171.

If title accrue in Easter vacation, yet you may deliver declaration as of Easter term.

If the title of the lessor of plaintiff accrue in *Easter* vacation, yet the plaintiff may deliver his ejectment as of *Easter* term, and shall recover thereon, because he makes up his issue, or takes judgment as of the next term, 2 *Vent.* 174. It must be brought within twenty years. 21 *Jac.* l. c. 16. *Sid.* 432. A tenant at will is not a trespasser, and if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff cannot recover. *Goodtitle v. Herbert*, 4 *Term Rep.* 680.

Twenty years.
Tenant at will.

Several lessors.

If there be several lessors, and it is stated that they demised, you must shew such a title in them, that they could demise the whole. *Cro. Jac.* 166.

Motion for Judgment.

Annex a warrant or memorandum on a 5s. stamp.

This motion should be made the *same term* the notice to appear is, and an affidavit is to be made of the service on the tenant, or his wife, and endorsed, to move for judgment against the casual ejector: fee to counsel 10s. 6d. He may either move it in court, or sign his name to it; if the former, it is handed to the clerk of the rules; if the latter, take it to the office yourself.

(a) An actual entry is necessary to avoid a fine, though it be by a tenant for life. 7 *Term Rep.* 433. and the day of the demise must be laid *after* it, *ibid*, and 727.

In a town cause you may move this the first day of the term; but to have a plea, it must be moved before the four last days of the term; if not, the tenant will have until two days before the essoign-day of the next term to appear and plead. Town cause.

If it be a country cause, and the declaration be to appear of Michaelmas or Easter term, the motion must be made in the term the notice is to appear in, and the rule or judgment must be drawn up of that term, according to the new rule; pay rule 7s. for every tenant after the first 6d. The agent before he makes his motion, keeps a copy of the declaration by him, in order to make up the issue, if it be required. Country cause.

Where there are several tenants on the same demise, only one motion, and one rule for judgment is necessary. *Doe v. Roe, 7 Term Rep. 477.* Though the name of each tenant was separately prefixed to the notice served on him. Where there are several tenants on one demise, only one motion.

It is ordered, that the clerk of the rules of this court shall for the future keep a book, in which shall be entered all the rules which from time to time shall be delivered out in ejectment, instead of the present book, containing a list of the ejectments moved; in which book shall be mentioned *the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, (the first lessor of the plaintiff, with the words "and others," if there be more than one,) and also the name of the casual ejector.* The clerk of the rules to keep a book of the rules delivered out in ejectment.

And it is further ordered, that unless the rule for judgment be drawn up and taken away from the office of the clerk of the rules, *within two days after the end of the term* in which the ejectment shall be moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment. R. M. 31 Geo. 3. Rule for judgment to be taken away two days after the end of the term the ejectment is moved.

made. (a) *John Doe* on the demise of J. P. plaintiff.
at the King's Bench.

and
Richard Roe defendant.

A. B. of in the county of maketh Affidavit of
ath and saith, that he this deponent did, on the the service.
ay of last, personally serve J. B. tenant in pos-

(a) The like rule was made in C. P. E. 48 Geo. 3. See P. Prac. 6 Ed. 597.

session of the premises in the declaration hereto annexed mentioned, with a true copy of the declaration and notice thereunder written, hereto annexed, and at the same time this deponent (*read to him the notice thereunder written*), or it may be, acquainted the said J. B. of the intent and meaning of the said declaration, and notice thereunder written.

If the wife served. 6 Term Rep. 765.

To be sworn before a judge, if a town cause, and a commissioner, if in the country: engrossed on a 2s. 6d. stamp-paper. If the wife was served then say, "*served the wife of J. B. tenant in possession of the premises at the dwelling-house of the said J. B. situate at, &c. or at the place of residence of the said J. B. situate at,*" &c. (it being necessary as well in a town cause, as a country one.) The affidavit must be positive that the tenant is tenant in possession; for information, or belief, will not do in this case. *Barnard. 330. 429.*

If served on several tenants.

If the declaration be served on several tenants, then state that the deponent did personally serve C. D. E. F. &c. tenants in possession of, &c. with the declaration hereto annexed, and the notice thereunder written, by delivering a true copy of the said declaration, and notice to each of them the said C. D. E. F. &c. and at the same time, read over the said notice to each of them the said C. D. E. F. &c. (*or explained to each of them respectively the intent and meaning of the said declaration and notice thereunder written.*)

Affidavit where one is served personally and the wife of the other.

Personally serve C. D. tenant in possession of part of the premises in the declaration of ejectment hereto annexed mentioned, with a true copy of the said declaration, and of the notice there underwritten, and at the same time acquainted the said C. D. of the intent and meaning of the said declaration and notice: and this deponent further saith, that he did, on the same day, also serve G. H. tenant in possession of the residue of the premises in the annexed declaration mentioned, with another true copy of the said declaration, and notice thereunder written, by delivering the same to, and leaving with S. H. the wife of the said G. H. at the dwelling house of the said G. H. situate at, &c. being the residue of the premises in the said declaration mentioned, and this deponent then explained to the said S. H. the intent and meaning of the said declaration and notice thereunder written.

Of Defect in the Affidavit of Service.

It often happens that an affidavit of the service of an ejectment is defective, such as not stating the particular mode in which the party served it: in that case the customary mode has been, to get a supplemental affidavit made, which take to the clerk of the rules, who will attend a judge thereon, and obtain an order to draw up the rule. See *Jinny v. Cutts*, 1 *New Rep.* 308. *Doe dem. Robinson v. Roe*, *Trin.* 35 *Geo.* 3. *K. B.* cited *Tidd*, 6 *Ed.* 510.

Rules for Judgment.

next after in the 57th year of king *Geo.*
the third.

Doe dem. of } Unless the tenant in possession (or if Rule for judgment for the whole premises.
A. v. Roe. } the premises are untenanted " unless
" some person claiming title to") the premises in question, shall appear and plead to issue on next after let judgment be entered for the plaintiff against the now defendant *Roe*. Upon the motion of Mr.——.

By the Court.

If for part,—then, unless C. D. tenant in possession of The like for part of the premises in question shall appear and plead to issue on next after let judgment be entered for the plaintiff against the now defendant *Roe* by default: but execution shall issue for such part of the premises as is in his possession. Upon the motion of Mr.——.

By the Court.

Unless C. D. &c. tenants in possession of part of the premises in question, and unless or some other person claiming title to such parts of the said premises as are untenanted, shall appear and plead to issue on next after , let judgment be entered for the plaintiff against the now defendant *Roe* by default; but execution shall issue for such part of the premises only as is in the possession of the said tenants, and such other parts as are untenanted. Upon the motion of Mr.——.

The like where part of the premises are untenanted, and part untenanted.

By the Court.

Of Judgment for Non-appearance and Plea.

The rule for judgment against the casual ejector being drawn up, if the tenant does not file common bail, if by

How to sign
judgment
against casual
ejector.

bill, (or if by original, enter his appearance with the filacer,) and plead within the time limited by the rule, (which in a town cause is four days exclusive after motion made, in a country cause four days exclusive of the last day of the issuable term,) for which plea search at each of the judge's chambers, who keep an ejectment book for that purpose, then enter on a 10s. stamp paper, the memorandum (if by bill), if by original, "the declaration only," so far as the premises; get a roll, enter the warrants of attorney thereon, as on other judgments, only say, "in a plea of trespass and ejectment," and on producing the rule for judgment, the clerk of the judgments will sign it, and in such case, common bail must be filed for the casual ejector, pursuant to R. M. 33 Car. 2. if by bill: if by original, there need no appearance, for the rule says "*common bail only*;" then sue out a writ of possession, pay signing judgment 4s. 2d. if on one demise. The judgment cannot be signed until the afternoon of the fifth day. *Say. Rep.* 303. *Sunday*, if the last day, is not reckoned a day, *ibid.*: therefore judgment cannot be signed till the afternoon of Tuesday.

When to be
signed.

If merits may
be set aside.

Although judgment be signed, if no possession is given or trial lost, and there be merits sworn to, it may be set aside on payment of costs upon motion. 1 *Salk.* 117. *Str.* 975. *Dobbs v. Passer*. The court said great inconveniences may arise if we do not interfere, timber may be felled, &c. In vacation the judge may stay proceedings if defendant have merits, which must be sworn to, provided the plaintiff will not waive his judgment on payment of costs.

Of amending Declaration.

Amending de-
claration.
Cow. 841.
Doug. 703.
3 Term Rep.
749.

It was formerly held, that a declaration in ejectment could not be amended; but it being a mere fictitious action; and the demise mere matter of form, it may be amended by altering the day of the demise so as to save the plaintiff from being barred by a fine, 4 *Burr.* 247. *Doe v. Pilkington*; therefore as the demise may be altered; there can be no doubt but that other parts less material may also be amended, the action being invented under the control of the court, for the advancement of justice, and merely to try the right in question. 1 *Burr.* 665. The term was amended without consent from five to ten years. *Str.* 1272. *Oates v. Shepherd*. *Vide* 1811 5 *Mod.* 333.

A verdict cures a defect in setting out the title, though Verdict. it cannot cure a defective title. *Stevens v. Evans*, 2 Burr. 1159. *Vide* 1152. 4 Burr. 2447.

The judges now amend declarations in ejectment, in Amended by the demise, after appearance, on a summons for that summons. purpose, it being a mere creature of the court, and open to every equitable regulation for expediting the true justice of the case. 2 Black. Rep. 940.

When to enter Appearance in Town.

If the tenements lie in *London* or *Middlesex*, and the Appearance notice in the declaration be to appear the first day of the in town. term, the tenant has four days exclusive of one day, and including the other, to enter his appearance next after the motion; provided the motion be made before the last four days of the end of the term; if moved after then until two days before the essoign-day of the subsequent term. If the notice should so happen as to be made to appear *generally* of the term, then the tenant has the *whole term* to appear in.

If in the Country.

If the tenements lie in any other county than *London* In the country or *Middlesex*, the tenant has four days after the issuable term, viz. Hilary or Trinity (although it be moved in Easter or Michaelmas term,) or if it be in a county, as Cumberland, where the assizes are held but once a year, then four days next after the end of the term preceding the assizes. It is said that the tenant cannot appear after the time allowed by the common rule for appearing is expired. *Say. Rep.* 151.; but I have no doubt he may, any time before judgment actually signed.

If term ends on Wednesday, tenant has all Monday to appear in, and judgment cannot be signed until Tuesday If term ends Wednesday. afternoon. *Say. Rep.* 303.

If an ejectment be brought on the forfeiture of a lease, Both parties may now have a particular of the breaches of covenant on which he intends to rely. 6 Term Rep. 597.

So if the plaintiff declare *generally* in ejectment, and the defendant have any doubt what lands the plaintiff means to proceed for he may obtain a judge's summons, If declaration be general.

to specify them, who will make an order. 7 Term Rep. 332. (*in notes*) *Doe v. Duke of Newcastle*.

Defendant to specify for what he defends.

On the other hand the plaintiff may call on the defendant, to specify for what he defends, when that is not ascertained by the consent rule. *Ibid*.

How to appear for the Tenant.

How to appear for tenant.

Get a blank consent rule from the stationers, pay 2d. fill it up in this manner (if you mean to defend for all the premises mentioned in the declaration), and the defendant's attorney only signs it, leaving a blank space above for the plaintiff's attorney to do the like, (for this is an agreement only entered into by the parties, for the rule itself, to be drawn up,) which is afterwards drawn up by the clerk of the rules.

Trinity term, in the 57th year of the reign of king George the third.

Markham and Le Blanc.

Common consent rule.

Middlesex, to wit. Doe, ex demise of Staples, against Roe, for 4 messuages, 4 barns, 4 stables, 500 acres of arable land, 500 acres of pasture, and 20 acres of furze and heath, in F. in the county of Middlesex. (a) } It is ordered, by the consent of the attorneys for both parties, that *Joseph Nix*, who claims title to the tenements in question, be made defendant in the stead of the now defendant *Richard Roe*, and do forthwith appear at the suit of the plaintiff, and file "common bail," (if the declaration be by original, leave out the words, "and file common bail,") and receive a declaration in an action of trespass and ejectment for the premises in question, and forthwith plead thereto, not guilty: and upon the trial of the issue, confess lease, entry, and ouster, and insist upon the title only; otherwise let judgment be entered for the plaintiff, against the now defendant *Richard Roe*, by default; and if upon the trial of the issue, the said *Joseph Nix* shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute "his bill" (if by original, say "his writ") against the said *Joseph Nix*, then no costs shall be allowed for not prosecuting the same; but the said *Joseph Nix* shall pay costs to the

(a) If you appear for all the premises, specify them as in the declaration.

plaintiff in that case, to be taxed: and it is further ordered, that if upon the trial of the said issue, a verdict shall be given for the said *Joseph Nix*, or it shall happen that the plaintiff shall not further prosecute his said "bill," (if by original, say "writ,") for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff shall pay to the said *Joseph Nix* costs in that behalf to be adjudged.

R. G. attorney for defendant.

N. B. This rule will do for a country cause.

This rule confesses the lease supposed to be made to the plaintiff as stated in the declaration, his entry in consequence, and the defendant's ouster of him; therefore the trial now stands upon the merits of the title only; and the original declaration is now altered by inserting *Joseph Nix*, the real defendant, instead of *Richard Roe*, the casual ejector.

Explanation of the consent rule.

If a man is seised in fee of the premises in question, and they are in his own occupation, he enters into the common consent rule only, and not as landlord.

If a man occupy the premises.

By 11 Geo. 2. c. 19. s. 12. "Tenants are obliged to give notice to their landlords of a declaration in ejectment being delivered, under pain of forfeiting three years improved or rackrent of the premises held by the tenant."

Tenants must give notice to their landlords.

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee, to enforce an attachment, is not liable to the penalties of 11 Geo. 2. c. 19. s. 12. for secreting ejectments, *Buckley v. Buckley*, 1 Term Rep. 647. It extends to cases only where ejectments were brought, which were inconsistent with the landlord's title. *Ibid*. It appeared that the ejectment was brought for the purpose of compelling the tenant to attorn to the mortgagee, which the act expressly permitted him to do.

Tenants to a mortgagor.

When the rule is filled up and signed, annex to it the plea of the general issue of not guilty; and if the declaration be by bill, file common bail, and deliver a memorandum or warrant at same time on a 5s. stamp.

When rule filled up, annex it to plea, if it be by bill, file common bail.

The clerk of the common bails (if by bill) marks the rule by consent, then take rule and plea to one of the judge's chambers, leave same, pay 2s. filing common bail in term, 1s. 2d. in vacation 4d. more.

The clerk of bails marks the rule by consent, before plea filed.

If the declaration be by original, then take the rule

If it be by original.

and plea with the memorandum to the filazer, with a note of appearance, thus, on plain paper: "*Middlesex* " (ss.) Appearance for *Joseph Nix*, at the suit of *John Doe* on the demise of *Edward Staples*;" he will sign the rule, and writ on it, "appearance entered," pay 3s. 6d. take same to one of the judge's chambers, leave it, and pay 2s.

Trinity term, in the 57th year of the reign of king *George* the third.

Law and Markham.

Plea of not guilty.

Nix. ats. Doe } And the said *Joseph Nix*, by J. P. ex dem. of *Staples*. } his attorney, comes and defends the force and injury, when, &c. and says, that he is not guilty of the trespass and ejectment above laid to his charge, in manner and form as the said *John Doe* hath above thereof complained against him; and of this he puts himself upon the country, &c.

How to appear for Part.

If several claim title.

If there be several persons who claim title, the rule may be drawn generally or particularly; generally, as that J. S. who claims title to the premises in question should be admitted for such messuages; and this puts a necessity on the plaintiff, to distinguish by proof, what tenements are in each tenant's possession, otherwise he can have no verdict. But if the rule be drawn specially, that supercedes the necessity of proof that the lands are in his possession. *Buller*, 95.

In ejectment defendant's attorney to give plaintiff's attorney notice of the tenements he defends for.

By rule, T. 15 *Car.* 2. It is ordered, that in every action of trespass and ejectment, where the defendant, by the rule of the court, shall confess lease, entry, and ouster, for so much of the premises in the declaration mentioned, as are in the possession of the said defendant, or his under-tenants, the attorney for such defendant shall immediately deliver to the plaintiff's attorney, a certain note in writing of the tenements so being in the possession of the defendant, or his under-tenants.

The present mode.

This mode is not now adopted, but instead thereof the premises defended for, are specified in the margin of the rule, and at the end thereof say, part of the premises mentioned in the declaration; which makes the rule special. But still the old mode may be adhered to, by giving a particular notice what you mean to defend for.

to plaintiff's attorney. But the other way saves the proof of such notice at the trial.

When the appearance is *for part*, the plaintiff having obtained the rule for judgment against the casual ejector, may sign his judgment for the residue against the casual ejector. If appearance for part.

Of Appearance by the Landlord.

As the tenant in possession of the premises cannot be compelled to appear and enter into the common rule to become defendant instead of the casual ejector, so neither could the landlord alone, and without joining the tenant, enter into such rule, and be made sole defendant, whereby great inconveniences happened through the obstinacy of tenants; it is therefore provided by stat. 11 Geo. 2. c. 19. that if the tenant shall refuse to appear, judgment shall be signed against the casual ejector for want thereof; but if the landlord of any part of the land, &c. shall desire to appear by himself, and consent to enter into the like rule that the tenant, in case he had appeared, ought to have done, then the court shall permit such landlord so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall further order therein. Landlord empowered to make himself defendant, &c.

By this statute it is provided, that the landlord may make himself a defendant, though the tenant refuses to appear: and though judgment is signed against the casual ejector, the court will order a stay of execution until they make a further order. Construction of the act.

The landlord appeared without the tenant, and after a verdict for the plaintiff, he brought a writ of error, upon which the plaintiff moved to take out execution; which the court refused to grant; for though it is left to their discretion, yet that can be only a legal one. The act intended to put the landlord in the place of the tenant, that he should not be stripped of his possession, by any act of the tenant, and it ought to be considered as if the tenant had brought error, which would undoubtedly be a supersedeas. This court cannot take upon them to judge whether there is error in the proceedings or not. *Jones v. Edwards, Str. 1241.* A landlord made defendant without his tenants may bring error.

If a judgment be against the landlord, and the plaintiff move for leave to take execution against the casual ejector, if the landlord bring error, the day for shewing cause against this rule, is the proper time of doing, and he If motion to take out execution against casual ejector after verdict

be made land-
lord must then
shew cause. may shew the writ of error for cause ; otherwise the rule will be absolute, and he cannot open the matter again.
George dem. Bradley v. Wisdom, 2 Burr. 756.

Who are considered as Landlords.

In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service. *Str. 914.* No man is to be admitted tenant or defendant in ejectment by the common rule, unless he has been in possession or received rent, and not a mere stranger. *Lord Holt. Comb. 209.*

Heir and lord.

If ejectment is brought by one claiming as heir of a copyhold, and the lord of a manor, who claims by escheat, *pro defectu hæredis*, applies to be admitted to defend with the tenant in possession or alone ; the court will direct the lord to bring ejectment against the heir, and the heir to be admitted to defend with tenant, or alone : if the lord refuses, they will discharge his rule to be admitted ; if the heir refuses, they will admit the lord to defend. *Fairclaim v. Shamtitle, 3 Burr. 1290.*

He who claims title shall be joined as a defendant though plaintiff opposes it ; 1 *Salk. 256.* ; though she is wife to the lessor, 257.

Cestui que
trust not per-
mitted, not
having been in
possession in-
stead of the
tenant, as
landlord.

Rule why *cestui que trust* should not be admitted to defend was opposed, on a ground that they had never been in possession, and could not be considered as landlords. Lord Kenyon—If the person requiring to be made a defendant under the act had stood in the situation of immediate heir to the person last seized, or had been in the relation of remainder-man under the same title as the original landlord, I am of opinion he might have been permitted to defend as a landlord, by virtue of the directions of the statute ; but here the very question in dispute between the adverse party and himself is, whether he is entitled to be a landlord or not ; and therefore we are not authorised to extend the proviso of the statute in such a case as this. Rule discharged. *Lovelock v. Doncaster, 3 Term Rep. 783.* The reporter has taken it, that the devisees applied, but he corrects it in 4 *Term Rep. 122*, and says the *cestui que trust*.

Heir.

The court permitted an heir who had never been in possession to come in and defend the ejectment: the father under whom he claimed died just after having first

obtained a similar rule. *Doe dem. Thistlewaite v. Roe*, 4 Term Rep. 122. An affidavit must be made to ground this motion.

J. E. Wright, devisee in trust, was admitted to defend as landlord. Motion was made to discharge that rule. Lord Kenyon asked the counsel for the rule, whether he would consent to try it in an issue, "*devisavit vel non*;" and on his refusal, discharged the rule. *Lovelock v. Doncaster*, 4 Term Rep. 122.

The court permitted a mortgagee to be made defend- Mortgagee. ant with the mortgagor. 3 Term Rep. 645. *Doe v. Cooper*.

Lord Bath, the reversioner, was admitted a co-defend- Reversioner. ant with the tenant. Comb. 339.

So a devisee in trust, 2 Term Rep. 122.

How to appear for Landlord.

Give brief to counsel for him to move that the landlord may be made defendant with the tenant; if he appears; and if the tenant does not appear, then that he may appear by himself, and enter into the common rule, and defend his title. When the landlord desires to be made a party to defend the title of the land in question, together with the tenant in possession, the court will grant it, so that he will enter into the rule to confess lease, entry, and ouster, and at the trial, confess, &c. and insist upon the title only. *Sty. P. R. 442*.

N. B. This is done by a counsel's hand, for the landlord in possession without any affidavit, fee 10s. 6d. draw up the rule at the clerk of the rules, pay 10s. 6d. make a copy and annex it to the plea; add also the common consent rule thereto, in which insert the landlord's name defendant, (and if he appear with the tenant, his name also must be inserted); file appearance or common bail, as the action is, with the memorandum on a 5s. stamp, and leave plea at the judge's chambers, with the copy of the rules annexed.

The landlord's rule further is, that the plaintiff be at liberty to sign judgment against the casual ejector, but execution is stayed, until the court shall further order.

Therefore where the landlord is permitted to defend without the tenant, judgment is always signed by default against the casual ejector; the reason of which is, that

Landlord's rule.

How to proceed.

The landlord's rule further is.

How to proceed.

under it, the plaintiff, if he obtain a verdict, may get possession of the premises, which he could not do, by virtue of a judgment against a person out of possession.

If landlord without the tenant.

If the landlord appears without the tenant, sign judgment immediately against the casual ejector, as before, then proceed to make up the issue against the landlord, taking the copy of the rules annexed to the plea, to the clerk of the rules, who will make office copies of same, annex copies to the issue to be delivered, and if upon the trial, plaintiff obtains a verdict, he must move on the production of the postea and office copies of the two rules, for liberty to take out execution against the casual ejector; it is a rule to shew cause; fee to counsel 10s. 6d. which serve, and then proceed to make it absolute as in other cases.

When landlord is made defendant, plaintiff must prove his (the defendant's) tenant in possession.

It is necessary to prove the defendant or his tenant in possession of the premises; for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession, and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. *Smith dem. Taylor v. Mann*, 1 Will. 220.

So if tenant appears only.

This case is confirmed by a new determination, *Goodright v. Rich*, 7 Term Rep. 327. and now, even where the tenant is made defendant, and enters into the common rule, the lessor is bound at the trial to prove the tenant in possession of the land, &c. claimed. *Ibid*.

If verdict for plaintiff.

The day for shewing cause why execution should not be taken out against a casual ejector, is the proper time for the landlord to resist it; if he brings error, he must then shew that for cause. *Edwards v. Edwards*, 2 Burr. 757. If he omits so to do, the execution will be regular (although error be sued out and allowed, previous to the motion). *George dem. Bradley v. Wisdom*, *Ibid*. 756. *Barnes*, 182.

Judgment against casual ejector set aside, landlord having no notice of ejectment from his tenant.

If a judgment be signed against casual ejector, the landlord may move to set it aside, on the ground of his tenant's not having given him notice. And the court will make such a rule on the ground that the possession ought not to be changed where there had been no trial or opportunity of trying, though obtaining the judgment might be owing to the default, or even treachery of the defendant's own tenant. But if the plaintiff had not been guilty of any collusion with the tenant, they thought it reason-

able that the tenant, who was the person guilty, should pay the costs. *Doe ex dem. Troughton v. Roe*, 4 Burr. 1996.

How to proceed against Tenant after Plea filed.

When the time for appearance is out, search at the judge's chambers for plea and consent rule; take them and give receipt in the book, and if you mean to go to trial (first sign the name of the plaintiff's attorney to the consent rule above the name of the defendant's attorney), take same to the clerk of the rules, who will file it, giving you the rule itself on stamp; and when the issue is delivered, a copy of that rule is annexed to the issue, made on plain paper.

When time for appearance is out, how to proceed.

If the declaration be by bill, then make up the issue with a memorandum of the term the plea is of, inserting the real defendant's name, instead of *Richard Roe*, the casual ejector. The memorandum of the issue will be the same as under title *Issue*, only say, "of a plea of trespass and ejectment."

Issue by bill, what term to be made of.

The issue must agree with the declaration first delivered (except in the defendant's name) unless an order has been obtained to amend same. *Ld. Ray*. 1411. or a summons may be taken out to make it so. *Ibid*.

Issue must agree with declaration.

The rule is, where there are a number of declarations served, and all depend precisely on the same title, there can be no doubt (if in the same county) the court will order them to be consolidated. *Doe ex dem. of Pulleney and others v. Freeman*, Trin. Term 1790, see 2 Term Rep. 639. *Cecil v. Briggs*; and it is upon this principle, that the court will not endure such a multiplicity of suits. *Contra Str.* 1149.

Consolidating of declarations.

If it is by original, make up the issue of the same term with the plea, but no memorandum. You begin with the declaration, then add plea and join issue. (a)

Issue by original.

The same time is allowed for notice of trial in ejectment, as in other cases, both in town and country.

Notice of trial.

(a) But if you do not deliver the issue that term, then make up the issue the term you add the *similiter*. This may be done as well by bill as by original.

Of Infant Lessor.

Infant plaintiff must name a guardian.

If the lessor of the plaintiff is an infant, after the plea is filed, you may have a summons "*to shew cause why further proceedings shall not be staid until a sufficient guardian is appointed for the lessor of the plaintiff, who will undertake to pay the defendant such costs as may be adjudged to him.*" And an order will be granted, although there is a real plaintiff named. You petition in the same manner to appoint a prochein amy, as under title *Infants*, and prochein amy enters into the common rule, and employs an attorney for that purpose.

Of Security for the Costs.

Lessor of the plaintiff must give security for costs.

Proceedings were staid till the lessor of the plaintiff should give security for costs, his residence being in *Ireland*, though this ejectment was brought under the direction of the court of Chancery, and 40l. security had been already given there. 2 Burr. 1177. *Doe v. Fulford*.

Former ejectment.

Where there has been a former ejectment, the rule is, to stay the proceedings in the second ejectment till the costs of the former are paid, and not till security is given for the costs of the second. *Doe ex dem. Selby v. Alston, Bart.* 1 Term Rep. 491. Per Buller, J.

Of making up the Record.

Record.

The record in ejectment is made up in the same manner as others, with two placitas of the term the issue is delivered, only say, "*in a plea of trespass and ejectment.*"

Verdict.

After trial if the plaintiff obtains a verdict, give a rule for judgment, and tax the costs as in other cases.

Special verdict.

On a special verdict it ought to appear, that the lessor of the plaintiff might enter at the time he brought the ejectment. 1 Burr. 60.

If judgment signed in a country cause.

If judgment in ejectment be signed in a country cause for want of a plea, but no possession delivered, a judge, at any time before the assizes, may compel the plaintiff to accept a plea, or stay the further proceeding; but if possession be delivered, it is said, he is without remedy. 1 Salk. 577. *Anon.* Per Holt. But it is discretionary in

the judge to make such order as he shall think fit, under the circumstances of the case. (a)

Judgments in Ejectment.

And the said *Richard*, by S. U. his attorney, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John Doe*, but makes default, by which the said *John Doe* remains therein undefended against the said *Richard Roe*; therefore it is considered that the said *John* recover against the said *Richard*, his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and upon this the said *John* freely here in court remits to the said *Richard* all such damages, costs and charges, as he the said *John* hath sustained by occasion of the trespass and ejectment aforesaid; therefore the said *Richard* is free from those damages, costs and charges, &c.: and upon this the said *John* prays the writ of our lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable before our said lord the king at *Westminster*, on _____ next after (if by original, on _____ wheresoever, &c.)

Judgment by
nil dicit with
a remittitur
damna.

At which day, before our said lord the king at *Westminster*, comes the parties aforesaid, by their attorneys aforesaid; and upon this the premises being seen and fully understood by the court here, it is considered, that the said *John* recover against the said *A.* his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, and his damages aforesaid assessed by the said jury in form aforesaid, and also 90l. by the court of our lord the king now here adjudged of increase to the said *John* by his assent, which damages amount in the

Final judg-
ment after
special verdict
for the plain-
tiff.

(a) After verdict for a message and tenement, the court will give leave to enter the verdict, according to the judge's notes for the message only (even pending a rule to arrest the judgment on that account), without obliging the lessor to release the damages. 8 *East*, 357. *Goodtitle v. Otway*, Cro. Eliz. 186. *Wood v. Payne*. 1 *Sid.* 295. *Burbury v. Yeomans*. S. P. See 2 *Str.* 834. *Goodtitle v. Walton*, and 1 *East*, 441. *Doe v. Plowan*, the two cases moved on to arrest the judgment.

Hab. fac. pos. whole to 90l. 1s.; and that the said A. be taken, &c. And upon this the said *John Doe* prays the writ of our said lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have his possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable, &c.

Judgment in
ejectment by
cognovit ac-
tionem relicta
verificatione
after issue
joined, with a
remittitur
damna.

Enter on the roll as far as to the end of the issue, then say, At which day before our lord the king at *Westminster*, comes the parties aforesaid by their attorneys aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereupon; and hereupon the said C. D. relinquishes bringing his said plea by him above pleaded, and says that he cannot deny the said action of the said John, nor but that he the said C. is guilty of the trespass and ejectment aforesaid above laid to his charge in manner and form as the said *John* hath above thereof complained against him; and he confesses and admits that the said *John* hath sustained damages, by reason of the trespass and ejectment aforesaid, besides his costs and charges by him laid out about his suit in this behalf to him, and hereupon the said *John Doe* freely here in court remits to the said C. the residue of the damages in the said declaration mentioned: and he prays judgment and his term yet to come of and in the tenements aforesaid, with the appurtenances together with his said damages so confessed and his costs and charges aforesaid to be adjudged to him, &c. Therefore it is considered, That the said *John* do recover against the said C. his term aforesaid, yet to come of and in the tenements aforesaid, with the appurtenances, and the said 1s. damages so in form aforesaid confessed, and also 7l. 10s. for his said costs and charges by the court of our said lord the king now here, adjudged to the said *John*, and with his assent, which said damages, costs and charges, in the whole amount to 7l. 11s.; And the said *John* prays the writ of our said lord the king to be directed to the sheriff aforesaid, to cause him to have his possession of his term aforesaid yet to come of and in the tenements aforesaid, with the appurtenances, and it is granted to him, returnable before our said lord the king at *Westminster*, on next after (if by original say on wheresoever, &c.)

Judgment
signed _____
day of _____
1817.

Judgment for
plaintiff on a
verdict.

To the end of the postea: Therefore it is considered that the said *John Doe* do recover against the said C. D. his said term yet to come of and in the tenements aforesaid with the appurtenances and his said damages to one shil-

ling by the jurors aforesaid in form aforesaid assessed, and also 1. for his said costs and charges by the court of our said lord the king now here adjudged of increase to the said *John Doe*, and with his assent, which said damages, costs and charges in the whole amount to 1. and let the said C. be taken, &c. And hereupon the said *John Doe* prays the writ of our said lord the king to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come of and in the tenements aforesaid with the appurtenances, and it is granted to him before our said lord the king at *Westminster* on next after &c. If by original then say before our said lord the king on wheresoever he shall then be in England, &c.

Capiatur.
R by bill.

How to proceed if there be a Nonsuit, or a Verdict.

If the defendant will not appear at the trial, and confess lease, entry, and ouster, the practice is to call the defendant and his attorney, if he be within the rule, and on his non-appearance, or on refusal to comply with the rule, to call the plaintiff and nonsuit him; then at the plaintiff's instance, the cause of the nonsuit is indorsed on the *postea*, which entitles the plaintiff to judgment against the casual ejector, when the *postea* is returned into court. *Salk. 259. Turner v. Barnaby.*

If plaintiff is nonsuited for want of confessing lease, entry and ouster, &c.

If there are several defendants for the same premises, and some appear and confess, but others do not, the plaintiff may go on as to the former, and be nonsuit as to the latter; but the cause of the nonsuit must be expressed in the record, viz. because those defendants would not confess lease, &c. and on the return of the *postea*, the court would be informed, what lands were in the possession of those defendants, that the judgment might be entered against the casual ejector as to them. *Groves v. Roll, 2 Salk. 456. pl. 6. See Ld. Ray. 729. Claxmore v. Searle et al.* The reason of such special entry is, that they should not have costs against the plaintiff.

Joint defendants, one appears and confesses, &c. the other makes default.

Where a verdict shall be given for the defendant, or the plaintiff shall be nonsuited for any other cause than for the defendant's not confessing lease, entry, and ouster, the defendant must proceed to tax his costs on the *postea*, as in other actions, and sue out a *ca. sa.* against the plaintiff; and if upon shewing the writ under seal to the lessor of the plaintiff, and serving him with a copy of the rule by consent, and demanding the costs, the lessor of the

How to proceed after plaintiff is nonsuited on the merits, or a verdict for the defendant.

plaintiff does not pay the costs, the court will grant an attachment against him, on an affidavit of the facts. (a)

How to proceed if plaintiff is nonsuited for want of confessing, &c.

If the plaintiff is nonsuited for want of confessing lease, entry, and ouster; sign judgment against the casual ejector, as if no appearance was entered, upon a 10s. stamp paper, producing to the clerk the rule for judgment. On the return-day of the *distringas*, take the record and consent rule, with the judgment paper, to the master, and he will tax the costs, on the consent rule; make a copy of the same; serve defendant therewith, and demand the costs; which, if not paid to the lessor of the plaintiff, he may, on affidavit thereof, move for an attachment. There is no occasion to stamp the rule with a 10s. stamp, nor the *postea*. Shew the original rule.

After nonsuit, cannot take out writ of possession until the day in bank.

Formerly, after a nonsuit at the assizes, for want of confessing a lease, entry and ouster, the plaintiff's attorney immediately signed his judgment and made out a writ of possession; but the practice is since altered, so that now it cannot be done, until after the *postea* comes in at the day in bank. *Styles*, 442.

Same point, and held same.

The court held that after a nonsuit for want of defendant's confessing lease, entry, and ouster, the writ of possession cannot be taken out, till after the *postea* comes in on the day in bank. *Doe v. Copeland*, 2 Term Rep. 780. *Salk*. 259. The Common Pleas have determined otherwise, *Fairfax v. Bentley*, *Hil.* 27 Geo. 3.

If the plaintiff is nonsuited, he may pay the costs to which of the defendants he pleases. *Str.* 576.

New trial.

A new trial may, upon proper grounds, be granted in ejectment, as well as in other cases. 4 Burr. 2224. *Goodtitle v. Clayton*.

Verdict cures a defect in the setting out of the title.

A verdict cures a defect in setting out the title, though it cannot cure a defective title. 2 Burr. 1159. The pleadings were intituled, H. 1 Geo. 3. the lease said to be made 33d year of said king, to hold from the quarter day then last past; verdict was confirmed, as being a mere mistake of the clerk. *Ibid*.

Execution must be taken out according to right.

Execution must be taken out according to what is right and justice is really recovered, and cannot be taken

(a) See the stat. 4 Jac. 1. c. 3. as to the costs on a nonsuit or a verdict. Also stat. 8 W. 3. c. 11.

in our said court before us at *Westminster*, recovered against the said C. D. for his damages which he had sustained, as well by reason of the trespass and ejectment aforesaid, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is also convicted as appears to us of record: and have you the said monies before us at *Westminster* on the said

next after to render to the said *John Doe* for his damages, costs and charges aforesaid; and have there then this writ. Witness, &c. N. B. This writ is to be signed by Messrs. *Provost* and *Chambre*, and sealed, a *præcipe* is made for the office.

If by original
leave the
word (then)
out.

The sheriff grants a warrant on this writ; pay 2s. 6d. and he will put the lessor of the plaintiff in possession. One who recovers land part of a highway, must recover it subject to the easement, and the sheriff must deliver possession subject to it. 1 *Burr.* 133.

George, &c. To the sheriff of *Middlesex*, greeting: Writ of possession on two several demises by bill.
Whereas A. A. lately in our court before us at *Westminster*, by bill without our writ, (a) and by the judgment of the said court, recovered against R. R. his term yet to come, of and in five messuages, and one acre of land, with the appurtenances, in the parish of St. Luke in your county, which J. H. on the first day of *October*, in the year of our reign, at the parish of St. Luke aforesaid, demised to the said A. to hold the same, with the appurtenances, to the said A. and his assigns, from the 30th day of *September* then last past, to the full end and term of five years from thence next ensuing, and fully to be compleat and ended; and also his term then and yet to come, of and in five other messuages, and one other acre of land, with the appurtenances, in the said parish of Saint Luke in your county, which J. M. on the said first day of *October*, in the year of our reign at the parish of St. Luke aforesaid, demised to the said A. to hold the same with the appurtenances to the said A. and his assigns, from the 30th day of *September* then last past, to the full end and term of five years from thence next ensuing, and fully to be compleat and ended, by virtue of which said several demises, the said A. entered into the said several tenements, with the appurtenances, and was possessed thereof; until the said R. afterwards, to wit, on the said first day of *October* in the said year, with force and arms, &c. entered into the said several tenements with the appurtenances which the said J. H. and J. M. had respectively demised to the said A. in manner and for the several terms aforesaid, which were not then nor are yet

(a) If by original, say "by our writ."

under it, the plaintiff, if he obtain a verdict, may get possession of the premises, which he could not do, by virtue of a judgment against a person out of possession.

If landlord without the tenant.

If the landlord appears without the tenant, sign judgment immediately against the casual ejector, as before, then proceed to make up the issue against the landlord, taking the copy of the rules annexed to the plea, to the clerk of the rules, who will make office copies of same, annex copies to the issue to be delivered, and if upon the trial, plaintiff obtains a verdict, he must move on the production of the postea and office copies of the two rules, for liberty to take out execution against the casual ejector; it is a rule to shew cause; fee to counsel 10s. 6d. which serve, and then proceed to make it absolute as in other cases.

When landlord is made defendant, plaintiff must prove his (the defendant's) tenant in possession.

It is necessary, to prove the defendant or his tenant in possession of the premises; for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession, and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. *Smith dem. Taylor v. Mann*, 1 Will. 220.

So if tenant appears only.

This case is confirmed by a new determination, *Goodright v. Rich*, 7 Term Rep. 327. and now, even where the tenant is made defendant, and enters into the common rule, the lessor is bound at the trial to prove the tenant in possession of the land, &c. claimed. *Ibid*.

If verdict for plaintiff.

The day for shewing cause why execution should not be taken out against a casual ejector, is the proper time for the landlord to resist it; if he brings error, he must then shew that for cause. *Edwards v. Edwards*, 2 Burr. 757. If he omits so to do, the execution will be regular (although error be sued out and allowed, previous to the motion). *George dem. Bradley v. Wisdom*, *Ibid*. 756. *Barnes*, 182.

Judgment against casual ejector set aside, landlord having no notice of ejectment from his tenant.

If a judgment be signed against casual ejector, the landlord may move to set it aside, on the ground of his tenant's not having given him notice. And the court will make such a rule on the ground that the possession ought not to be changed where there had been no trial or opportunity of trying, though obtaining the judgment might be owing to the default, or even treachery of the defendant's own tenant. But if the plaintiff had not been guilty of any collusion with the tenant, they thought it reason-

able that the tenant, who was the person guilty, should pay the costs. *Doe ex dem. Troughton v. Roe, 4 Burr. 1996.*

How to proceed against Tenant after Plea filed.

When the time for appearance is out, search at the judge's chambers for plea and consent rule; take them and give receipt in the book, and if you mean to go to trial (first sign the name of the plaintiff's attorney to the consent rule above the name of the defendant's attorney), take same to the clerk of the rules, who will file it, giving you the rule itself on stamp; and when the issue is delivered, a copy of that rule is annexed to the issue, made on plain paper.

When time for appearance is out, how to proceed.

If the declaration be by bill, then make up the issue with a memorandum of the term the plea is of, inserting the real defendant's name, instead of *Richard Roe*, the casual ejector. The memorandum of the issue will be the same as under title *Issue*, only say, "of a plea of trespass and ejectment."

Issue by bill, what term to be made of.

The issue must agree with the declaration first delivered (except in the defendant's name) unless an order has been obtained to amend same. *Ld. Ray. 1411.* or a summons may be taken out to make it so. *Ibid.*

Issue must agree with declaration.

The rule is, where there are a number of declarations served, and all depend precisely on the same title, there can be no doubt (if in the same county) the court will order them to be consolidated. *Doe ex dem. of Pulteney and others v. Freeman, Trin. Term 1790, see 2 Term Rep. 639. Cecil v. Briggs*; and it is upon this principle, that the court will not endure such a multiplicity of suits. *Contra Str. 1149.*

Consolidating of declarations.

If it is by original, make up the issue of the same term with the plea, but no memorandum. You begin with the declaration, then add plea and join issue. (a)

Issue by original.

The same time is allowed for notice of trial in ejectment, as in other cases, both in town and country.

Notice of trial.

(a) But if you do not deliver the issue that term, then make up the issue the term you add the *similiter*. This may be done as well by bill as by original.

Of Infant Lessor.

Infant plaintiff must name a guardian.

If the lessor of the plaintiff is an infant, after the plea is filed, you may have a summons "*to shew cause why further proceedings shall not be staid until a sufficient guardian is appointed for the lessor of the plaintiff, who will undertake to pay the defendant such costs as may be adjudged to him.*" And an order will be granted, although there is a real plaintiff named. You petition in the same manner to appoint a prochein amy, as under title *Infants*, and prochein amy enters into the common rule, and employs an attorney for that purpose.

Of Security for the Costs.

Lessor of the plaintiff must give security for costs.

Proceedings were staid till the lessor of the plaintiff should give security for costs, his residence being in *Ireland*, though this ejectment was brought under the direction of the court of Chancery, and 40l. security had been already given there. 2 Burr. 1177. *Doe v. Fulford*.

Former ejectment.

Where there has been a former ejectment, the rule is, to stay the proceedings in the second ejectment till the costs of the former are paid, and not till security is given for the costs of the second. *Doe ex dem. Selby v. Alston, Bart.* 1 Term Rep. 491. Per Buller, J.

Of making up the Record.

Record.

The record in ejectment is made up in the same manner as others, with two placitas of the term the issue is delivered, only say, "*in a plea of trespass and ejectment.*"

Verdict.

After trial if the plaintiff obtains a verdict, give a rule for judgment, and tax the costs as in other cases.

Special verdict.

On a special verdict it ought to appear, that the lessor of the plaintiff might enter at the time he brought the ejectment. 1 Burr. 60.

If judgment signed in a country cause.

If judgment in ejectment be signed in a country cause for want of a plea, but no possession delivered, a judge, at any time before the assizes, may compel the plaintiff to accept a plea, or stay the further proceeding; but if possession be delivered, it is said, he is without remedy. 1 Salk. 577. *Anon.* Per Holt. But it is discretionary in

the judge to make such order as he shall think fit, under the circumstances of the case. (a)

Judgments in Ejectment.

And the said *Richard*, by S. U. his attorney, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John Doe*, but makes default, by which the said *John Doe* remains therein undefended against the said *Richard Roe*; therefore it is considered that the said *John* recover against the said *Richard*, his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and upon this the said *John* freely here in court remits to the said *Richard* all such damages, costs and charges, as he the said *John* hath sustained by occasion of the trespass and ejectment aforesaid; therefore the said *Richard* is free from those damages, costs and charges, &c.: and upon this the said *John* prays the writ of our lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable before our said lord the king at *Westminster*, on next after (if by original, on wheresoever, &c.)

At which day, before our said lord the king at *Westminster*, comes the parties aforesaid, by their attorneys aforesaid; and upon this the premises being seen and fully understood by the court here, it is considered, that the said *John* recover against the said *A.* his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, and his damages aforesaid assessed by the said jury in form aforesaid, and also 90l. by the court of our lord the king now here adjudged of increase to the said *John* by his assent, which damages amount in the

Final judgment after special verdict for the plaintiff.

(a) After verdict for a messuage and tenement, the court will give leave to enter the verdict, according to the judge's notes for the messuage only (even pending a rule to arrest the judgment on that account), without obliging the lessor to release the damages. 8 *East*, 357. *Goodtitle v. Otway*, Cro. Eliz. 186. *Wood v. Payne*. 1 Sid. 295. *Burbury v. Yeomans*. S. P. See 2 *Str.* 834. *Goodtitle v. Wallon*, and 1 *East*, 441. *Doe v. Plowman*, the two cases moved on to arrest the judgment.

this; or else that the landlord shall from thenceforth hold the demised premises discharged from the lease. 1 *Burr.* 619. *Doe v. Lewis.*

Application to
pay rent must
be made be-
fore trial, &c.

Tenant may
apply to pay
rent, &c.

Even after
judgment and
before pos-
session.

Ejectment
how to be
prepared.

Affidavit to
move for
judgment.

The court will not after a trial, stay the proceedings on payment of the rent, &c. the statute only warranting such application before trial; and the statute is not confined to cases in ejectment brought after half a year's rent, where no sufficient distress was to be found on the premises. *Roe dem. West v. Davis*, 7 *East*, 363. See 5 *Term Rep.* 465. *Bull. N. P.* 95. *qu. Ed. Pure v. Sturdy.*

If the tenant is served with a declaration in ejectment upon this act of parliament, he may apply by summons to stay proceedings upon payment of the rent and costs to be taxed. *Str.* 900. 8 *Mod.* 345. 10 *Mod.* 383.

This may be done even after judgment against the casual ejector, and before any writ of possession. *Str.* 900. *Goodtitle v. Holdfast.*

The ejectment is prepared as before, (it is not necessary to make an actual entry or seal a lease,) laying your demise after the rent became due, which is generally twenty days after the quarter ended; after service thereof, the following affidavit is necessary, entitling the cause.

J. K. of, &c. merchant, the lessor of the plaintiff in this cause, and J. B. of, &c. gentleman, severally make oath and say; and first this deponent J. B. for himself saith, that on the day of last past, and for several days before, the messuage (a) in the annexed declaration of ejectment mentioned, was shut up, and there being no tenant in the actual possession thereof, he this deponent did, on the day of last, affix a true copy of the declaration in ejectment, hereto annexed, and the notice thereunder written, upon the door of the said messuage, in the said declaration mentioned, late in the tenure of A. B. being the most notorious part thereof. And this deponent J. K. for himself saith, that before such copy of the declaration in ejectment was affixed as aforesaid, there was due to him

(a) Here state the premises for which the ejectment is brought (if for lands only) say, being a notorious place of the lands comprised in the said declaration in ejectment.

this deponent, as landlord thereof, from the said A. B. the tenant thereof, the sum of 14l. for half a year's rent upon and by virtue of a certain indenture of lease, bearing date the day of 1817, and made between this deponent of the one part, and the said A. B. of the other part; and that no sufficient distress was then to be found upon the said messuage, with the appurtenances, countervailing the arrears of rent then due to this deponent; and this deponent further saith, that, at the time of affixing the copy of the said declaration in ejectment as aforesaid, he had power to re-enter the said messuage, with the appurtenances by virtue of the said lease, for the non-payment of the rent so in arrear as aforesaid. *Vide Cooke's Rep.* 68.

Move on this affidavit as before, for judgment against the casual ejector, pay counsel's fee 10s. 6d. and if no appearance and plea, draw up rule for judgment, and sign same. How to move for judgment.

Where there is no stipulation in the lease for entry without demand, you may, notwithstanding, enter without demand, provided six months rent is in arrear, and there is not a sufficient distress; otherwise, in such cases, you must make a demand. *Goodtitle v. Cator, Dougl.* 486. An actual entry is not necessary to maintain this ejectment. *Ibid.* 485. 2 *Ld. Raym.* 750. 1 *Salk.* 259. When landlord may enter.

An actual entry not necessary.

If the tenant appears and pleads, all the matters in the above affidavit must be proved on the trial. 1 *Burr.* 620. *Doe v. Lewis.* (a) If tenant appears and pleads, what proof requisite.

Proceedings under the stat. 11 *Geo. 2. c.* 19.

It may in this place be proper to notice a provision which the legislature has made for landlords, where tenants desert the premises, by *stat.* 11 *Geo. 2. c.* 19. *s.* 16. after stating that, "whereas landlords are often great sufferers, by tenants running away in arrear, and not only suffering the demised premises to be uncultivated, without any distress thereon, whereby landlords or lessor might be satisfied for the rent arrear, but also refusing to deliver up the possession of the demised

(a) In case of judgment against the casual ejector, and nonsuit for not confessing, &c. the *stat.* directs, that it shall be made appear to the court "by affidavit." On the trial, the same thing must be proved. *Dennison, J. ibid.*

" premises, whereby the landlords are put to the ex-
 " pence and delay of recovering in ejectments, enacts
 " that if any tenant holding any lands, tenements or
 " hereditaments at a rack-rent, or where the rent re-
 " served shall be full three-fourths of the yearly value
 " of the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two justices of the peace of the county, riding, division, or place (having no interest in the demised premises) at the request of the lessor or landlord, lessors or landlords, or his, her or their bailiffs or receiver, to go upon, or view the same, and affix or cause to be affixed on the most notorious part of the premises, notice in writing what day (at the distance of fourteen days at least,) they will return to take a second view thereof, and if upon such second view, the tenant or some person upon his or her behalf shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof, to such tenants as to any demise therein contained only, shall from thenceforth become void."

Provided. always that such proceedings of the said justices shall be examinable in a summary way, by the next justice or justices of assize, of the respective counties in which such lands or premises lie: and if they lie in *London* or *Middlesex*, by the judges of the court of King's Bench and Common Pleas; if in the counties palatine, by the judges thereof; or if in *Wales*, then before the courts of Grand Sessions, who are thereby respectively empowered to order restitution to be made, to such tenant, together with his or her expences and costs, to be paid by the lessor landlord, if they shall see cause for the same, and in case they shall affirm the act of the said justices, to award costs, not exceeding 5l. for the frivolous appeal. s. 17.

In *Easter* term, 41 Geo. 3. *Gurney* moved for a mandamus to be directed to some magistrates of the county of *Middlesex*, in order that they should proceed on s. 16. of this *stat.* and put a landlord into possession of some premises directed by the tenant. He stated his case to be within the act, and said that the magistrates had refused to interfere, because the tenant was a lodger only. *Lord Kenyon*, on referring to the act

asked whether the premises were on lease, and if there was a proviso for re-entering? On the counsel answering in the negative, his lordship said in his opinion the case was not within the act. The preamble of the act spoke of the expence and delay to which landlords were put, in bringing ejectments; it seemed therefore to him, that the cause applied only to cases where the landlord could support an ejectment, as where there was a written lease with a condition to re-enter if no such thing existed; in this case the magistrates had done right in refusing to interfere. Rule refused. *MS. case, cited Woodf. Land. and Ten. 4 Ed. 430.*

If brought for Non-payment of Rent only.

By the determination in the case of *Goodright v. Cator*, it appears if an ejectment is brought for non-payment of rent only, and not under the above statute, a demand must be made of such rent, on the day it becomes due, and it is a proceeding at common law. *7 Term Rep. 117. Doe v. Wandless.*

In an ejectment for the forfeiture of a lease, the court will compel the plaintiff to give in a particular of the covenants of the breaches of the times when, &c. on which he means to insist that the defendant has forfeited his lease, and extend the rule that he shall not be permitted to give evidence at the trial of any thing, not contained in those particulars. *Birch v. Phillips, 6 Term Rep. 597.*

For the forfeiture of a lease, a particular of the breaches may be had.

Proceedings by a Mortgagee.

If the mortgagee have a right of entry, and the premises be tenanted, he may serve an ejectment; but if the premises be vacant, then he must seal a lease thereon as before stated.

It appears that a mortgagee may recover in ejectment (without notice to quit) against a tenant who claims on a lease from the mortgagor granted *after* the mortgage, without the privity of the mortgagee. *Keech v. Hall, Dougl. 21. 3 East, 449. S. P.*

When no notice.

But if there is a tenant from year to year, and the landlord mortgages, pending the year, the tenant is entitled to six months notice to quit from the mortgagee. *Birch v. Wright, 1 Term Rep. 378.*

When necessary.

If he has encouraged tenauraged

It is said, that if the mortgagee has encouraged the tenant to lay out money, he cannot maintain this action. *Ibid. Cowp. Rep. 473.*

If the mortgagor be left in possession after mortgage.

When the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases. *Dougl. 22. Keech v. Hall. Moss v. Gallimore. 279.*

Lease.

The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. *Dougl. 22.*

Mortgagee may proceed if he has given notice to the tenant that he will not disturb him.

The courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. *Lord Mansfield, Dougl. R. 282. Moss v. Gallimore.*

After notice he is entitled to rent in arrear.

A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. *Moss v. Gallimore, Dougl. 279*, but he cannot eject.

As to redeeming.

The stat. 7 Geo. 2. c. 20. enacts, *That where an ejectment is brought by a mortgagee to recover the possession of mortgaged premises, if pending the suit, the person who has a right to redeem, shall appear and pay the mortgagee, or bring into court the principal, interest, and costs, to be computed by the proper officer, he shall be discharged from the mortgage; and the court shall, by rule, compel the mortgagee to re-convey the premises, and deliver up all deeds relating to the title of the same, see s. 3. the proviso.*

A judge's order will do.

A judge's order may be had for this purpose: and the master is to make all just deductions and allowances on paying off the mortgage.

Application to pay after writ of possession executed.

If applied under this act, after a writ of possession by summons to pay principal, interest, and costs; and the lessor of plaintiff's attorney objected to come into the terms. Mr. Justice Buller said, do you choose to have a bill to redeem? If so, I cannot relieve. But, by con-

sent, he made the order. *Dec ex dem. Bunce v. Ros*, E. T. 1791.

If the mortgagee bring an ejectment, the court will order him to shew cause why, on payment, or bringing into court principal, interest, and costs, proceedings should not be staid. *Str.* 413. Now done by summons. Court will order all proceedings to stay.

On the application of the mortgagor, or his assignee, of the equity of redemption, the court will stay proceedings on payment of principal, interest, and costs, without paying money lent on bond: but not if it was an heir. *Str.* 1107. *Archer v. Snatt, Andrews*, 341. The like without payment of a bond for money lent.

On payment of principal, &c. court will stay proceedings, and on bond for performance of covenants in a deed of mortgage, and will discharge defendant out of custody, though he had agreed to convey the equity of redemption to plaintiff, if no tender was made of conveyance to be executed. 1 *Wils.* 80. *Skinner v. Stacey*. On payment, will stay proceedings on bond, &c.

But if the mortgagor has entered into an agreement under seal with the mortgagee to convey the equity of redemption, the court will not stay the proceedings on payment of principal, interest and costs, as a court of equity would decree him to complete such agreement. *Goodtitle v. Pope*, 7 *Term Rep.* 185. When the proceedings will not be stayed.

How to recover the Mesne Profits, and from what Time.

If judgment be obtained in ejectment, bring an action for the mesne profits; and as it is consequential to the recovery, it may be brought either in the name of the *nominal plaintiff*, or in the name of *his lessor*; and in either shape, it is equally his action against the *tenant in possession*, to recover the value of the profits, unjustly received by the tenant, in consequence of the ouster complained of in the ejectment; for after a recovery in ejectment, the tenant is estopped from controverting the plaintiff's title, in a subsequent action for the mesne profits, provided the plaintiff only proceeds for mesne profits, *from the time of the ouster complained of in ejectment*; but if he proceed for antecedent profits, he must prove his title to the premises from whence they arose, to shew his right to receive them. 2 *Burr.* 661. *Ashyn v. Parkyn*.

In order to prove the plaintiff's title, where the judgment is against the tenant in possession, and the action by against him, it seems sufficient to produce an office copy of the judgment, without proving the writ of possession Proof required in such action.

3 Wils. 119. executed. But where the judgment is against the casual ejector, he must then prove the writ of possession executed also. *Bull. N. P.* 87. And it is usual for the plaintiff to recover the costs of the ejectment as well as the mesne profits, *ibid.* 88. therefore the attorney's bill will be necessary to be proved. 1 *Term Rep.* 547. As to the value of the mesne profits, they must be proved; but in estimating that value, the jury are not confined to the mere rent of the premises, for they may give whatever damages they think proper, though the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years. 3 *Wils.* 121. 2 *Burr.* 667. *Bull. N. P.* 88.

Jury are not confined to the mere rent.

There is no distinction between the judgment verdict and by default.

The tenant is concluded.

In *Asplin v. Parkin*, 2 *Burr.* 668. Lord Mansfield says, there is no distinction between a judgment in ejectment on a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried, and determined against the defendant; in the last case, it is confessed. The tenant is concluded by the judgment, and cannot controvert the title, consequently he cannot controvert the plaintiff's possession; because his possession is part of his title. The judgment concludes the parties, as to the subject matter of it; beyond the time laid in the demise, it proves nothing at all.

If lessor goes for damages beyond time laid in demise.

If the lessor of the plaintiff goes for mesne profits before the demise laid, the defendant is then at liberty to controvert his title; so against a precedent occupier, the record is no evidence, and therefore against him, the plaintiff must shew and prove a title. *Bull. N. P.* 87. 1 *Sid.* 239. *Str.* 960. See 3 *Wils.* 118. as to damages. And one tenant in common, may have this action against another tenant in common, after judgment against the casual ejector. *Ibid.*

Tenant in common.

When the court will stay proceedings till security.

If an action be brought by the nominal plaintiff, the court, on application, will stay the proceedings thereon, till security is given for costs. *Sayer*, 78.

Cannot pay money into court.

The defendant cannot pay money into court in an action for mesne profits. 2 *Wils.* 115. *Holdfast v. Morris*.

When the judge must certify for costs.

The plaintiff in an action for mesne profits recovered less than 40s. and the judge did not certify that the title came in question, the master allowed him 1s. costs. Motion to review the taxation. Lord Kenyon.—This action is founded wholly and entirely on title. The judge might have certified in this case, that the freehold or title

was chiefly in question under stat. 22 & 23 Car. 2. c. 9.: but not having done so, the plaintiff is entitled to no more costs than damages. *Doe v. Davies*, 6 Term Rep. 693. So in C. P. by Eyre, C. J.

In ejectment, a writ of habeas corpus is the proper process to remove the plaintiff (under which the defendant must appear in this court, and enter into the common rule, and plaintiff must declare *de novo*) and not a writ of *certiorari*, as in replevin, whereby after the record removed, the parties are to proceed upon it, and not begin *de novo*.

How to remove an ejectment from the mayor's court, London.

The nominal plaintiff in ejectment in whose name the mesne profits have been recovered, may sue for an escape of the defendant in execution for such mesne profits. *Doe v. Jones*, 2 Maule and Selw. 473.

Nominal plaintiff may bring an action for an escape.

Proceedings in second Ejectment, Costs of former not paid.

Where there has been a former ejectment brought, for the trial of the same title, the court will order the proceedings to be staid in a second ejectment, until costs of the former are paid; but not security for the costs of the second. 1 Term Rep. 491. *Doe ex dem. Selby v. Alston*, 2 Str. 1152, 1206. 1 Salk. 225, 228, 9.

So the court will stay the proceedings in a former ejectment until the costs of a nonsuit in a former ejectment be paid, if it be brought on the same title, though it be brought for different lands in a different county, and though all the defendants be not the same. *Keene ex dem. Angel v. Angel*, 6 Term Rep. 740.

Nonsuit.

So proceedings in ejectment were staid, till the costs of a former ejectment brought by the father of the lessor of the plaintiff, against the defendant's father, on the same title were paid. *Doe dem. Feldon v. Roe*, 8 Term Rep. 645.

Second ejectment on same title.

Ejectment in C. B. and after verdict for the plaintiff and costs paid by defendant, who then brought ejectment in the K. B. for same premises, and recovered, but was not paid his costs; and a third ejectment being commenced in the C. B. by the plaintiff in the first ejectment, the court staid the proceedings till payment of the costs of the second ejectment in K. B. *Doe d. Walker v. Stevenson*, 2 B. & P. 22.

Where a third ejectment brought.

Proceedings have also been staid, till the costs of a for-

Former ejectment for mesne profits,

mer ejectment for same premises, and also of an action for the mesne profits were paid. *Doe d. Pinchard v. Roe*, 4 East, 585.

If defendant in former ejectment be evicted, and bring another.

If the defendant in a former ejectment who was then evicted, bring another for same premises, the court will stay the proceedings, until the costs of the former are paid. *Thrustout d. Williams v. Holdfast*, 6 Term Rep. 623.

If no vexation, the court will not stay proceedings.

The vexation of the party is said to be the ground of these rules. 2 Str. 1152. *Doe v. Hatherly et al.* 4 Mod. 349. And therefore if there appear to be no vexation, the court will not make a rule for stay of proceedings until the costs are paid of a former ejectment; but this seems to be where the costs are not demandable, there being a countermand of notice of trial in time. *Thrustout v. Troublesome*, 2 Str. 1099; also see 2 Str. 1121. *Brittain v. Grenville*, as to a pauper who brought a second ejectment though verdict against him. 16 Viner Ab. 262. pl. 15. See other cases in my C. P. 5 Ed. 651.

Though brought in another court.

The courts now consider a former ejectment in another court, as one in the same court, and will stay proceedings in a second. Str. 548. 2 Black. Rep. 1158. Vide 1 Str. 564. 1 Term Rep. 491.

Proceedings staid in a second ejectment till the special verdict in a former one determined.

Proceedings in a second ejectment were staid till the special verdict in a former one was determined. 2 Str. 1105. Vide 2 Black. Rep. 1815. where plaintiff was refused to discontinue, after special verdict, to adduce fresh proof in contradiction to the verdict.

Though the court may stay proceedings in a new ejectment until the costs of a former ejectment, between the same parties, and also the costs of an action for mesne profits, dependant thereon, are paid; yet they will not extend the rule to include the damages in the action, for the mesne, however vexatious the proceedings of the present lessors of the plaintiff may have been. *Doe on the dem. of Church and another v. Barclay*, 15 East, 233. See 1 H. Bla. Rep. 10.

BANKRUPTS.(a)

As to his protection from arrest.

If the bankrupt's time be enlarged by an order of the lord chancellor, the bankrupt having surrendered, is pro-

(a) See title ARREST.

ted from arrest. And in case he surrender within the forty-two days, the commissioners may by their own authority, afterwards enlarge the time for taking his examination, during which enlarged time he is privileged from arrest. *Davies v. Trotter*, 8 Term Rep. 475. If he attends upon notice for that purpose, a meeting of the commissioners to declare a dividend of his estate, he is also protected during such attendance, although it be several years after his last examination, *ibid.* 534. *Arding v. Flower*.

This privilege is a particular one, to enable bankrupts to surrender, and till their actual surrender, is confined to the act of going with that view: not a general privilege during the whole time which the act allows for that purpose, *Cow.* 156. And they may be taken in order to be surrendered by their bail, at any time; even during their examination before the commissioners. 1 Atk. 238. *Cooke's Bank.* L. 113.

If any bankrupt, who shall have obtained his certificate shall be taken in execution, or detained in prison, on account of any debts due before he became bankrupt, by reason that judgment was obtained before such certificate was allowed and confirmed, it shall be lawful for any one or more of the judges of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate allowed, to order any sheriff, &c. who hath any such bankrupt in his custody, by virtue of any such execution, to discharge such bankrupt out of custody, without payment of any fee. 5 Geo. 2. c. 30. s. 13.

Bankrupts imprisoned after certificate allowed, how to be discharged.

A discharge under a commission of bankrupt in a foreign country, is no bar to an action for a debt arising here, brought against the bankrupt by a subject of this country. *Smith v. Buchanan*, 5 East, 177.

Discharge under commission in a foreign country, no bar to a debt arising here.

But when defendant gave to plaintiff in a foreign country, where both were resident, a bill of exchange drawn by defendant upon a person in England, which bill was afterwards protested here for non-acceptance, and defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state, such certificate is a bar to an action here upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in England. *Potter v. Brown*, 5 East, 124.

Contra if contracted in a foreign country.

What is a discharge of a debt in the country where it

was contracted, is a discharge of it every where. 130. S. C. 4 T. R. 182. *Hunter v. Potts*, S. P.

How to discharge a bankrupt, if in custody, before certificate obtained.

If the bankrupt was in custody before his certificate is signed, and afterwards it is allowed, apply to a judge at his chambers, for a summons to shew cause why he should not be discharged, he having obtained his certificate; which, upon producing, and an affidavit (if the attorney does not attend for the plaintiff) of the debt having accrued before he became a bankrupt, and that the certificate was obtained without fraud, the judge will grant an order, upon the third summons, on affidavit of the service. See 2 B & P. 390. if validity of commission is meant to be disputed.

Cases relating to Bankrupts.

Bond given after the bankruptcy for a debt due prior, good.

A bond and warrant of attorney to confess judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt was contracted before. And if the obligor were in custody, charged in execution, it is not necessary that an attorney should be present, on his part, at the time of executing the bond and warrant. *Birch v. Sharland*, 1 Term Rep. 715.

Cannot be discharged from an extent.

If the bankrupt be in custody at the suit of the king, on an extent, he cannot be discharged therefrom. 1 At. 220.

A bankrupt in custody, on an attachment for the non-performance of an award, discharged on having his certificate.

A bankrupt was taken upon an attachment for not performing an award; after which he became bankrupt and obtained his certificate; and the court held that this was a demand for which an action of debt will lie; and the act says, he shall not be arrested, &c. for any debt due before the bankruptcy; and therefore he was discharged. 2 Str. 1152. *Baker's case*.

A bankrupt discharged from a judgment given after his bankruptcy for a debt due before.

On motion to discharge a bankrupt out of execution, on the stat. 5 Geo. 2. c. 30. it appeared, that the debt was contracted before the bankruptcy, and sued for and recovered pending the commission, and before any certificate obtained; and the judgment was afterwards affirmed on error, and costs given on such affirmance. The court discharged him as to all; for not having his certificate, he could not plead to the action; and these costs were attendant on the original judgment, and cannot be considered as given for delay of execution, when it appears there ought to have been no execution, though no writ

of error had been brought. 2 Str. 1196. *Graham v. Benton*.

A certificate discharges a bankrupt from the debt accruing before the commission, though judgment be not obtained till after the certificate allowed. *Boutflower v. Coats*, *Cowp. Rep.* 25. When the certificate will discharge the debt.

A certificate obtained under a second commission is void, for a second commission cannot be taken out against an uncertificated bankrupt, because all his effects belong to the creditors of the first: therefore, when he had put in bail, and an application for an *exoneretur*, the court refused. *Martin v. O'Hara*, *Cowp. Rep.* 823. A certificate under a second commission.

The penalty of a bond for securing an annuity having once been forfeited before a bankruptcy, the value of the annuity may be proved, and the certificate is a discharge from future payments, notwithstanding the arrears shall have been paid after the forfeiture, and before the bankruptcy. *Willie v. Wilkes*, *Doug. Rep.* 520. Annuity bond when forfeited.

A certificate will be no bar to an action for the mesne profits, for as the damages are uncertain, they cannot be proved under the commission. *Goodtitle v. North*, *Ibid.* 584. 6 Term Rep. 489. *Vide*, if the demand is such that the amount can be liquidated, 3 Term Rep. 539. *Uttersen v. Vernon*. Mesne profits.

But if an action be brought upon a bail-bond against the bankrupt himself, though he is discharged from the original debt by his certificate, yet he is not from this; for the court said, that this was a new debt, and distinct cause of action, and therefore refused to relieve the bankrupt, and ordered the sheriff to pay the money to the plaintiff. *Cockerill v. Owston*, 1 Burr. 436. But court said, the certificate shall discharge proceedings depending against bail, in an action upon the old debt, who are not already fixed. *Ibid.* Certificate will not discharge the bankrupt upon an action on bail-bond.

The defendant, 9th of May, 1734, was bail in error: 25th October following he committed an act of bankruptcy, and after got his certificate. On 12th November, judgment affirmed; and to an action on the recognizance he pleaded his certificate: held he was not discharged; nor it was a contingent debt, for which the plaintiff could not come in under the commission, the stat. 7 Geo. 1. 51. only letting in those where the payment was certain enough future. 2 Str. 1043. *Hockley v. Merry*. When there is an act of bankruptcy between becoming bail in error, and affirmance no discharge.

A bankrupt being sued as an executor, pleaded a false plea, which being found against him, the plaintiff had When bankrupt sued

as an executor is liable to costs.

judgment *de bonis propriis* for the costs; after which he obtained his certificate. Cur.—The pleading a false plea was his own act, and his own fault; and the judgment and execution *de bonis propriis*, for costs, was singly owing to his false plea, which was subsequent to the issuing of the commission; consequently could not have been proved under the commission, and therefore cannot be discharged by the certificate. *Howard v. Jemmel*, 3 Burr. 1368.

If A. recover a judgment against B. before the bankruptcy of B. and revive it by *sci. fa.* after the bankruptcy, the costs of the *sci. fa.* relate back to the judgment, and may be proved under the

A commission issued against defendant, Dec. 1782, who afterwards obtained his certificate. In August 1787, plaintiff brought an action against him on balance of accounts, obtained interlocutory judgment in *Michaelmas* following; 19th Jan. 1788, a second commission issued against defendant; on 31st same month, plaintiff signed final judgment, and error was brought; 16th June, 1789, defendant obtained his certificate under a second commission, but under this he did not pay 15s. in the pound; 30th May 1790, error was nonprossed, and costs 40l.; in *Trinity* term 1794, plaintiff sued by *sci. fa.* to revive the judgment, defendant pleaded his certificate; verdict for plaintiff, sittings after the term, for 269l. 12s. 6d. and 40l. costs in error, the costs of *sci. fa.* were taxed at 36l. On 2d April 1794, the defendant's goods were taken in execution for the 269l. 12s. 6d. and the 40l.; and same day defendant was taken in execution for the 36l.; and a friend paid it into the hands of the sheriff, till the opinion of the court could be had. *Rule why the 36l. so paid should not be restored, and why defendant should not be discharged as to any future arrest on account of the same.* In support of the rule was cited 2 Bl. Rep. 317. *Aylet v. Harford*; 1 Wils. 41. *Graham v. Benton*; 1 H. Black. Rep. 291. *Lewes v. Piercey*; and *Cowp.* 138. *Blandford v. Foote*: against it, 1 Black. Rep. 400. *Cs. Bank. L.* 152. 1 Atk. 140. Court. We are clearly of opinion, that the certificate delivers the defendant from the costs of the *sci. fa.* as well as from the original judgment. Rule absolute. *Phillips v. Brown*, 6 Term Rep. 282. See my C. P. 5 Ed. 656. for many other cases.

How Bail are to be relieved.

If the bail of a bankrupt are proceeded against, they may, before a *scire facias* returned *scire feci*, or before the return of the second *sci. fa.* (in case the bankrupt has obtained his certificate,) apply by summons for as

exoneretur to be entered on the bail-piece, on the defendant having obtained his certificate, and on producing the certificate, and affidavit of the debt having accrued before the bankruptcy of the defendant, with that of having obtained his certificate without fraud; the judge will on the third summons, on affidavit of the service and attendance, grant an order for that purpose.

The rule is, if the certificate be obtained, before the bail are fixed, they shall be discharged; but if they be fixed before the certificate is obtained, they remain liable. *Woolley v. Cobb, 1 Burr. (a) 244.*

By stat. 49 Geo. 3. c. 121. s. 14. It shall not be lawful for any creditor who shall have brought an action against a bankrupt, for a demand which arose prior to the act of bankruptcy, or might have been proved under the commission, to prove the debt or to claim the same, without relinquishing such action, and all benefit from the same.

Not lawful for a creditor who shall have brought an action against a bankrupt to prove or claim without relinquishing such action.

And that the proving or claiming such debt, shall be deemed an election to take the benefit of such commission; but he is not liable to pay the bankrupt his costs of such action.

And if such creditor shall have brought any action against a bankrupt jointly with any other, his relinquishing such action against the bankrupt, shall not affect such action against such person or persons.

PROCEEDINGS AGAINST PRISONERS.

If any person is in custody of the marshal or keeper of any other prison, it will behove the practiser to take care, and observe the rules laid down in the strictest manner, in proceeding against him; otherwise his client may lose the custody of the prisoner, the law paying the highest regard to the liberty of the subject.

Formerly when a defendant was detained in custody by mesne process of this court for want of bail, if the

(a) But if they be bail in error, although the principal become bankrupt and obtain his certificate, they cannot be discharged. *Southcote v. Branthwaite, 1 Term Rep. 624.*

The present mode for delivering declarations against a prisoner.

plaintiff did not, within two terms after the arrest, cause the defendant to be brought by *habeas corpus* and committed, so that he might declare against him in custody of the marshal, the defendant might be discharged out of custody upon common bail or appearance; but now by stat. 4th & 5th year of W. & M. c. 21. s. 2. it is enacted, *That if any defendant be taken or charged in custody, at the suit of any person on any writ out of the courts at Westminster, and imprisoned for want of sureties, the plaintiff in such writ may, before the end of the next term after such writ shall be returnable, declare against such prisoner in the court where such writ shall issue, whereupon the said prisoner shall be taken or charged in custody, and may cause a true copy to be delivered to such prisoner, or to the gaoler, or keeper of the prison, in whose custody he shall remain; to which he shall appear and plead; and if not the plaintiff shall have judgment, as if he had appeared.*

To be alleged in declaration, in whose custody the prisoner is.

That on all such declarations on process out of this court, it shall be alledged, "*in custody of what sheriff, bailiff, or steward, or other person, such prisoner shall be at the time of such declaration, by virtue of the said process of the said court, at the suit of the plaintiffs:*" which allegation shall be as effectual as if such prisoner or prisoners were in the custody of the marshal. s. 3.

And at whose suit detained.

If the declaration do not allege, either expressly or by implication, in what custody the defendant is detained, and at whose suit, it will be bad on a general demurrer. 1 Wils. 119. 2 *Ld. Ray.* 1362. But this allegation is only necessary, where the plaintiff proceeds upon a bill of *Middlesex* or *latitat*, or by attachment of privilege.

Rule, E.
35 Geo. 3. for
the limits of
the King's
Bench prison.
6 Term Rep.
305.

Ordered, that the rules of the King's Bench prison shall be comprised within the bounds following, exclusive of the public houses hereafter mentioned; that is to say, from *Great Cumber-court*, in the parish of *St. George the Martyr*, in the county of *Surrey*, along the north side of *Great Suffolk-street*, as far as the brewhouse; and from thence along the north-west side of *Webber-street*, to the *Half-way-house*, and from thence along the western side of *Barron's-buildings*, and *St. George's-row*, to the *Westminster-road*; and then across the said road, and along the western side of *St. George's Mall*; and from the pastry cook's at the west end thereof, directly across to the lamp-post, on the foot-path near the watch-house facing the *Dog and Duck*; and along the said foot-path, from the said lamp-post to another

lamp-post, on the eastern side of the said road facing *Key's Nursery*, and then along the whole of the said road, leading by *Prospect-place*, to the *Elephant and Castle*; and from thence along the eastern side of *Newington-causeway*, to *Great Cumber-court* aforesaid; and it is also ordered, that the *House of Correction* for the county of *Surrey*, the new gaol *Southwark*, and the gaol now building for the county of *Surrey*, and the highways, exclusive of the houses on each side thereof, leading from the King's Bench prison, to the said gaols respectively, shall be within and part of the said rules: and it is lastly ordered, that all taverns, victualling-houses, ale-houses, wine-vaults, houses or places licensed to sell gin or other spirituous liquors, and all places licensed for public entertainments, shall be excluded out and deemed no part of the said rules. (a)

Taverns, &c.

By rule H. T. 26 Geo. 3. it is ordered, that from and after the last day of this term, in all cases where a prisoner is or shall be taken, detained, or charged in custody by mesne process, hereafter returnable issuing out of this court, and the plaintiff shall not cause a declaration against such prisoner to be delivered to such prisoner, or to the gaoler or turnkey of the gaol or prison, where such prisoner is or shall be detained, or charged in custody, before the end of the next term after the return of the process, by virtue whereof such prisoner is or shall be taken, detained, or charged in custody, and (unless the prisoner is or shall be in custody of the marshal) cause an affidavit to be made and filed with the clerk of the rules of this court, of the delivery of such declaration, and the time when, and the person to whom the same was delivered, before the first day of the next term after the delivery of such declaration, the prisoner shall be discharged out of custody by writ of supersedeas, to be granted by this court, or one of the judges thereof upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

Rule respecting the declaration against prisoners.

Affidavit.

order made 27 Epri.

And in case of a commitment or surrender to the mar- In case of commitment or surrender.

(a) See a further rule, T. 36 Geo. 3. 1796, taking in the parish church of St. George the Martyr, in the borough and church-yard adjoining. 6 Term Rep. 778. See 9 East, 151. *Field v. Jones*, on a day-rule going before the court sat, held good.

some disagreement appears in the Rules and decisions; as whether the Plaintiff is bound to declare within two days after the return of the writ, or within two terms after the actual custody - the rules are as follows. A Defendant is liable to be discharged by writ of supersedeas for want of a declaration till the end of the next term.

shal in discharge of bail, after the return of process, and before a declaration delivered, unless the plaintiff shall cause declaration to be delivered as aforesaid, before the end of the term next after such commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged out of custody by writ of *supersedeas*, to be granted as aforesaid, upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

If a habeas corpus and commitment, how to proceed.

vide Epithome
Page 27c 28

That in all cases where a prisoner shall be taken or charged in custody by any sheriff or other officer by mesne process of this court, and shall be afterwards removed by writ of *habeas corpus*, and committed thereupon by this court or any of the judges thereof, to the custody of the marshal, the time for the plaintiff's proceedings against such prisoner shall commence and be computed from the prisoner's being first taken or detained, or charged in custody, by virtue of such process.

No treaty to prevent the defendant's having the benefit of a *supersedeas* unless it be in writing.

That no treaty or agreement shall be sufficient cause to prevent any defendant's having the benefit of a *supersedeas* for want of prosecution, unless the same be in writing, signed by the defendant or his attorney, or some person duly authorised by the defendant, and it be therein expressed, that proceedings are staid at the defendant's request. *Ibid.* For the further part of this rule *vide* title, *How to discharge for Want of Proceeding to Trial.* *vide page 726 this Book.*

In what time plaintiff must declare on an escape warrant.

Where any defendant, being a prisoner in custody of the marshal of this court upon mesne process, shall be taken and detained in custody of any sheriff of this kingdom, by virtue of a judge's warrant of this court, for an escape made from the custody of the marshal, it is ordered, that the plaintiff in such action shall declare against the said defendant in custody of such sheriff, before the end of the second term after such taking, otherwise a *supersedeas* may be made for such defendant. *R. T. 6 Ann.*

If writ be sued out in one term, returnable the next, plaintiff is not bound to declare before the end of the next term after return of writ.

The 11th June 1795, thirteen days before the end of *Trinity* term, process issued, and on same day defendant arrested, and a writ returnable first return of *Michaelmas* term following; no declaration having been delivered in the *Michaelmas* term. Rule why defendant should not be discharged for not declaring in two terms. Court—The plaintiff is only bound to declare before the end of the next term after the return of the writ. Rule discharged.

Richardson v. Richardson, 6 Term Rep. 547. Hilary term 1796.

It is now determined that a declaration may be delivered by the same plaintiff against a prisoner in custody of the marshal, in vacation. *Heron v. Edwards*, 8 Term Rep. 643. contra 2 Burr. 1048. 1052. So in a new action.

A declaration may be delivered in vacation.

How to proceed after Arrest in Custody of the Sheriff.

The defendant not having found bail at the plaintiff's suit, and being in custody of the sheriff, the plaintiff, before the end of the next term after such writ shall be returnable, must deliver his declaration. But by rule of court, no such declaration can be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged in custody. Rule, E. 5 W. & M. Reg. 3.

Plaintiff must before the end of the second term deliver a declaration.

But it cannot be delivered before return of the writ.

A bill is prepared in the first instance, ingrossed on a 4d. stamp parchment, and filed with the clerk of the declarations in the King's Bench office; the form of which is as follows:

How to proceed.

Surrey, } A. B. complains of C. D. being in the custody of the sheriff of the county of *Surrey*, by virtue of his majesty's writ of *latitat*, issued out of the court of our lord the king before the king himself, against the said *Richard*, at the suit of the said *John*, returnable before the king himself at *Westminster*, on next after (a) of a plea of trespass on the case: for that whereas (as in other declarations.) Add pledges.

Declaration against a prisoner in custody of the sheriff.

(a) The return day of the writ.

Having filed the bill, then ingross three exact copies of it on a 4d. stamp paper (written on one side only;) these are called the declaration, one of which is to be delivered to the defendant, or left for him with the gaoler or turnkey, (b) in whose custody the defendant is, asking him "if defendant is a prisoner at the suit of the plaintiff;" pay him 1s. if he acknowledges defendant to be in his custody, make an affidavit of the service, and swear it either before a judge or commissioner in the country, annexing one of the copies of the declaration delivered thereto: when it is sworn make another copy of the affidavit of the service on a 2s. 6d. stamp paper, and annex it to the third copy of the declaration; take both copies to the clerk of the rules, who will give a rule to appear and

Of delivering and filing declaration.

12 East, 294.

(b) 1 Str. 474.

plead on the second copy, which you are to keep ; pay
5s.(a)

Gaoler or
keeper must
deliver to
the prisoner
declaration, or
be attached.

Ordered, that if any gaoler, or keeper of a prison, having received a copy of a declaration against a prisoner in his custody, shall suppress the same, and not deliver it forthwith unto such prisoner, an attachment shall be issued against him. R. E. 5 W. & M. Reg. 3. s. 7.

In the King's Bench.

A. B. plaintiff,
and

C. D. defendant.

The affidavit
of service of
declaration.

E. F. of, &c. gentleman, maketh oath and saith, That he did on the day of last past deliver unto G. H. gaoler or keeper of his majesty's gaol in and for the county of Surrey, a true copy of the declaration hereunto annexed ; and the said gaoler or keeper then acknowledged to this deponent, that the said defendant was a prisoner in the said gaol, at the suit of the said plaintiff A. B. by virtue of a writ of *latitat* issued out of this honourable court, returnable before the delivery thereof.

The affidavit is to be filed before the first day of the next term, after delivery thereof.

After rule to
plead given.

(b) 1 Term
Rep. 591.
6 Term Rep.
S. P. 524.

After having filed the affidavit of service, and rule being given by the clerk of the rules to plead, the time being expired (no demand of a plea in this case being necessary), (b) if the defendant does not plead, you may then sign judgment by default, and proceed to judgment according to the rules herein laid down.

If defendant
removes from
a county
gaol to the
Fleet, pend-
ing the suit,
no demand of
plea is neces-
sary.

Where the defendant removes himself from the county gaol to the Fleet-prison by *habeas corpus*, and he goes there in the action at the suit of the same plaintiff, no demand of plea is necessary. For as no demand of plea was necessary when he was in custody of the sheriff, he ought not, by surreptitiously procuring his removal from that custody, to require the plaintiff to take any other steps than would have been necessary before his custody was changed. *Wilkinson v. Brown*, 6 Term Rep. 524. 1 Salk. 350. where it is said, each court shall retain the defendant in which he is first attached.

When a rule
to plead may
be given.

If you forget to sign judgment within the time limited

When there
may be a rule
for time to
declare.

... (a) There can be no rule for time to declare against a prisoner but in one case, where he is sued in a joint action, where the other is not arrested or outlawed. 2 Crompt. 9. Barn. 396.

by the rule, you may in the next term, give a fresh rule to plead, and for want of plea, sign judgment, without a demand of plea.

N. B. The words of the rule are to proceed to trial or final judgment, within three terms next after declaration delivered. The term wherein such declaration shall be delivered, is to be taken as one. R. H. 26 Geo. 3. You must proceed to trial, or final judgment must be signed on or before the last day of the third term; and after final judgment, the prisoner must be charged in execution within two terms next after such judgment so had and obtained, the term in which the judgment is signed to be accounted one of the two terms, R. H. T. 26 Geo. 3. unless prevented by error or injunction.

Must be charged in execution within two terms.

If judgment be signed by default, and an inquiry is to be executed in the third term, take care to make it returnable in time, to give a rule for judgment, so as it expire *on or before the last day of that term*, and the inquisition must also be left stamped with a 10s. stamp with the master on the last day of the term, in order that he may sign the judgment the same day; and he will do it in court if required.

If inquiry is to be executed.

Having shewn how prisoners are to be declared against and detained, it will now be requisite to shew when they are to appear and plead.

Within what Time Prisoners have to plead in County Gaols.

Ordered, that upon every arrest by mesne process out of this court returnable the first day of Easter or Michaelmas term, if a copy of the declaration be delivered against such defendants before one month from the day of Easter (that is before the third return of Easter term,) or the morrow of All Souls (which was then the third return of Michaelmas term)(a), and affidavit thereof made and filed, if the defendant doth not appear before the end of ten days after Easter and Michaelmas terms respectively, judgment may be entered against him, rules having been given; but if he appears before the end of ten days after the term, he shall imparle until the next term, unless

If declaration be delivered before one month of Easter or Michaelmas.

(a) This term is since shortened by the stat. 24 Geo. 2. c. 48.

the action be in *London* or *Middlesex*, and defendant be in prison within forty miles of *London* or *Westminster*; then though he doth appear before the expiration of ten days after the end of the term, he shall plead two days before the *essoign* day of the next term, and in default thereof, rules having been given, judgment may be entered against him as aforesaid. R. E. 5 W. & M. sect. 3.

But if declaration be delivered one month after Easter, or the Morrow of All Souls, &c.

If a copy of declaration be delivered against such defendant, on or after one month from the day of Easter in Easter term, or the morrow of All Souls, in Michaelmas Term, or in Hilary or Trinity term, and thereupon the plaintiff gives rules to appear and answer; then if the defendant appear two days before the *essoign* day of the next term, he shall imparle until the said next term; but if he does not appear within that time, judgment may be signed. *Ibid.* sect. 4.

If declaration be delivered before *essoign* day of the next term, after the return of the writ.

If a writ be returnable in any term, and a copy of the declaration has been delivered before the *essoign* day of the next term, the plaintiff in such term may give rules to appear and answer, and if the defendant does not appear and plead upon the expiration of the rules, judgment shall be given against him. *Ibid.* sect. 5.

When the rule to plead and appear, if defendant is in custody of the sheriff is to be given.

If defendant is in custody of the sheriff, a rule to appear and plead must not be given before affidavit of the delivery of the declaration is filed, which must now be filed with the clerk of the rules before the first day of the next term after delivery. Rule, H. 26 Geo. 3.

Construction of the rule.

If the writ be returnable before the last return of the term, and party arrested and in custody, and the declaration is delivered against a prisoner in custody of the sheriff four days before the end of that term, he shall appear and plead in eight days, provided the affidavit is filed in due time after delivery, and rule be given.

When defendant has two days before the *essoign* day to plead.

But if not, he has still two days before the *essoign* day of the next term to appear and plead thereto; and in case of neglect to sign the judgment that term, then a common four day rule to plead may be given the next term, and no plea being filed or delivered, plaintiff may sign judgment.

Defendant may, before final judgment, put in bail.

A prisoner may, any time pending the action, and before final judgment, file special bail, and justify same, in court in term, or before a judge in vacation, upon due notice, and be discharged. See the stat. 48 Geo. 3. c. 46 s. 6. title Special Bail.

Where the defendant pleads before his time, without giving notice to the plaintiff, it is a surprise upon the latter, who, without such notice, is not required to search in the office for a plea as of a term prior to that wherein regularly the defendant should have pleaded. *Parkinson v. Thompson*, 8 Term Rep. 596.—Per Cur. 4 Term Rep. 664. *Thomas v. Prichard*.

If defendant pleads before his time, he is to give notice.

The rule to appear and plead expired on the 19th of November, the defendant entered his plea the 16th Nov. plaintiff signed judgment on the 20th, for want of a plea. Motion to set it aside, court made rule absolute, the defendant having pleaded in regular time, and held no notice of it was necessary. *Rusholm v. Chapman*, 5 Term Rep. 473.

When he need not give notice.

Make out a *ca. sa.* and lodge it with the sheriff of the county, which is sufficient, pay him 2s. 6d. (and it is absolutely necessary that the judgment be entered, docketed, and filed of record, before this is done.)

How to charge defendant in execution in custody of the sheriff.

If the defendant be in custody in Newgate, Ludgate, or any other county or city gaol, at the suit of any other person, the plaintiff must sue out process against him, directed to such sheriff, &c. as the case is, and such process must be left with him at his office, in order to charge such defendant in custody. In this case make affidavit of the debt, and sue out a writ as in other cases; pay sheriff for charging him in custody 2s. 6d. and such plaintiff must proceed against the defendant as before directed, otherwise he will be superseded; and N. B. he is to file a bill in this case before he delivers the declaration. *Sayer's Rep.* 49.

If defendant in custody in Newgate, &c. at the suit of any other plaintiff.

Every prisoner having a day rule, shall return within the walls or rules of the said prison, at or before nine in the evening of the day for which such rule shall be granted. *R. Hil. 45 Geo. 3. 6 East, 2.*

Prisoners on day rules to return at or before nine.

A day rule when made covers by relation back the liberation of a prisoner, who having signed the petition, had gone out of prison before the sitting of the court the same day, and although the marshal had been sued for an escape before the court sat. *9 East, 151. Field v. Jones.*

Of the day rule.

How to proceed if Defendant be in the Custody of the Marshal ats. same Plaintiff.

If the defendant be in custody of the marshal of the King's Bench prison, at the suit of the same plaintiff, How to proceed if defen-

How to proceed if defen-

dant is in custody of the marshal.

then make two copies of the bill, one on parchment, the other on paper (stampd with a 4d. stamp,) (a) file the bill first, then deliver the copy to the turnkey, pay 1s. and in this case no affidavit is requisite; but give a rule to plead, and demand a plea as in other cases. 1 *Term Rep.* 591.

When defendant is to plead.

When a bill is filed against a prisoner in custody of the marshal, if a copy of it be delivered for him to the turnkey, four days exclusive before the end of the term in which the writ is returnable, a rule to plead being given and plea demanded, 1 *Term Rep.* 591. the defendant shall plead as of that term, or judgment may be signed; but if the bill be not filed, and the copy delivered four days exclusive before the end of the term, the defendant may impleur until the next term. N. on R. E. 5 W. & M.

When he may impleur.

Within what time to proceed to trial or judgment.

You must also proceed to trial, or final judgment, within three terms next after declaration delivered, accounting that term one. R. *Hil.* 26 *Geo.* 3. *vide page 727*

When to execution.

And also charge defendant in execution, within two terms after final judgment signed, accounting that term one, unless prevented by error or injunction. *Ibid.*

Declaration against a prisoner in custody of the marshal by bill.

Middlesex (ss) A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself: for that whereas. Add pledges; you proceed as in other cases to sign judgment, if no plea, &c.

If an action is not bailable, and defendant in custody, how to proceed.

If the defendant, a member of parliament, be in custody of the marshal, and you would wish to proceed against him for a debt not bailable, file a bill against him, and deliver a copy to him in custody to plead in four days; in this case it is not necessary to issue a writ of summons, but demand the plea, as in other cases, and if none, sign judgment. See 5 *Term Rep.* 362. *Jackson v. Mackrell*; where court held, that being already in custody, no process is necessary; and you may declare against him as being in custody of the marshal.

How to charge defendant in execution in custody of marshal.

Get a rule from the clerk of the rules for the marshal to acknowledge defendant in his custody, pay 7s. 6d. take same and leave it at the marshal's house with 10s. 6d. he will write his acknowledgment thereon, which get from

(a) To be written only on one side the paper. 12 *East*, 294. *Champneys v. Hamlin*. If written on both sides supersedeable.

him, then take a piece of parchment without a stamp, in the shape of a bail-piece, and enter the *committitur* thereon, thus:

Easter Term, 57th Geo. 3.

Law and Markham.

Middlesex, to wit. C. D. is committed to the custody of the marshal, &c. in execution, at the suit of A. B. in a plea of trespass on the case, for — damages, there to remain until, &c. (a) Committitur-piece.

R. R. attorney. Judgment of *Hilary* term, 57th *Geo. 3.*
Roll. 566.

Ordered that every *committitur* on every judgment obtained in this court, against any prisoner or prisoners, shall be filed with the clerk of the dockets, on or before the last day of the term in which such prisoner or prisoners is or are to be charged in execution, who shall enter such *committitur* on the judgment roll, within four days after the end of such term, exclusive of the last day of the term, unless the last of such four days be *Sunday*, and in that case within five days next after the end of such term: and that in default thereof, such prisoner, &c. shall be entitled to be discharged. R. E. 41 *Geo. 3.* 1 *East*, 410. (b) Rule for filing and entering committitur against prisoners. See 1 *East*, 405. *Pearson v. Rawlings*, which was the occasion of making this rule.

The acknowledgment by the marshal ought to be of the same term in which the defendant is charged in execution, and an acknowledgment two terms preceding is not sufficient. *Fisher v. Stanhope*, 1 *Term Rep.* 464. And the *committitur* must be filed of the same term as the marshal's acknowledgment. 10 *East*, 46. *Cunningham v. Cogan*. Of what term the acknowledgment by marshal is to be of.

There is a book kept in the K. B. office called the marshal's book, in which are entered the names of persons charged in execution previously to their being so charged. But this is a book of no authority; and only meant for the Marshal's book kept in the office.

(a) The damages and costs in case, if in debt, the sum recovered, and costs.

(b) This rule does not extend to the case of a prisoner committed under a *hæ. corp. ad satisfaciendum*, in which no *committitur*-piece was ever necessary. *Pitcher v. Faucestt*, T. 43 *Geo. 3.* To what the rule does not extend.

marshal's convenience, that he may readily see what persons are charged in execution: so that it is (in truth and reality) only a memorial of the defendant's being charged in execution in custody of the marshal; and not the cause or foundation of such charge and detainer. *Hutchins v. Kendrick*, 2 Burr. 1049. This has been adhered to in a late case before Lord *Kenyon*, and he held it not necessary on the master's certificate, and refused to discharge the prisoner for want of such entry.

Where to take the committitur.

Take *committitur* to the clerk of the judgments, and file it with him on or before the last day in which you are to charge defendant in execution, as he must enter it on the roll, or defendant is supersedeable: 4 Burr. 1481. *Fotterell v. Philby*; pay him 2s.; it is usual to enter the *committitur* in the marshal's book, at the same time, before you deliver it over; pay 6d.

Clerk of the docket is to send a list to marshal.

And where a name was left out it was rectified.

If in custody etc. of the king.

It is usual for the clerk of the dockets to send to the marshal at the end of every term a list of the *committitur* entered, with the plaintiffs' and defendants' names, and the sums for which they are charged in execution. And where the clerk of the judgments had omitted a name of a plaintiff, it was rectified by the court at the clerk's instance. *Gage and another v. Parsons*, M. 36 Geo. 3.

A prisoner in custody at the suit of the king, cannot be charged with civil process without leave of the court, or one of the judges.

If on attachment.

But where the defendant is in custody on an attachment for non-payment of costs, and charged with a civil action also, the court consider such an attachment to be only a civil execution, and therefore held that he might be charged in execution in the action without leave of the court. *Bonafous v. Schole*, 4 Term Rep. 316.

Plaintiff must give notice of his having abandoned a former committitur, which is erroneous, before he enters a second.

Judgment obtained (and affirmed on error;) execution sued for 60l. which were 5l. more than was really due; rule obtained why defendant should not be discharged, which was made absolute. Pending this rule the defendant was charged in custody for the real debt, upon which this court was now moved why the commitment of defendant should not be set aside for irregularity? Held, that as there was no affidavit that the plaintiff had given notice that the first commitment was abandoned, pending the former rule, that a second commitment for the same cause before the first was discharged, is clearly

informal. Rule absolute. *Topping v. Ryan*, 1 Term Rep. 227.(a)

If the defendant be charged in execution, and afterwards plaintiff dies, the executors need not revive the judgment, or charge the defendant *de novo*: for the execution is considered as executed. *King v. Millet*, H. 22 Geo. 3. *Tidd*, 211.

If the plaintiff proceeds faster in his cause than by the rules prescribed, and obtains a verdict, he must still charge the defendant in execution the next term after the distress is returnable, or he may be superseded.

The mode of charging a prisoner with a new action, in custody of the marshal, in term time is, by making an affidavit of the debt, filing a bill first against him, as being in his custody, and delivering a declaration, which is a copy of the bill, to the turnkey. But if to charge him in custody in the vacation with the new suit, then file a bill as of the preceding term; and if the cause of action arises after that term, there should be a special memorandum, the same as against an attorney, stating the day of bringing the bill into the office of the clerk of the declarations.

If you proceed in term an affidavit of the debt must first be made and sworn before a judge of this court, then prepare and ingross the bill on a 4d. stamp parchment, which file, with the warrant to prosecute with the clerk of the declarations, then make a close copy of the bill, called the declaration, on 4d. stamp paper, take the affidavit of debt, and declaration, to the clerk of the rules, who will indorse on the declaration the sum sworn to, and the contents of the affidavit, he returns the declaration to you and keeps the affidavit. The declaration then must be delivered to the defendant in prison, or to the turnkey, who will acknowledge him to be a prisoner, pay him 1s. afterwards give a rule to plead, and proceed as in other cases.

If the declaration be delivered four days before the end of the term, a rule to plead being given, and plea de-

(a) See *Tidd*, 292, where the marshal had acknowledged at the suit of A. and it was moved that he might be charged in execution *ats.* of B. on a judgment of outlawry which was ordered in the first instance. *Amos v. Martin*, T. 36 Geo. 3. I think a *ha. corp. ad satisfaciendum* in this case would have been proper.

manded, the defendant is to plead of that term; but if the bill be not filed, and the copy delivered, four days exclusive before the end of the term, the defendant is then entitled to an imparlance. R. E. 5 W. & M. Reg. 3. (a)

How if in vacation.

If the new detainer be in vacation, then you file the bill as of the preceding term, and make a copy of same as before, and also have an affidavit of the debt, which take to the clerk of the rules, and deliver the declaration as above, but the rule to plead cannot be given until the first day of the next term.

Though supersedable, yet may be charged in a new action.

If a prisoner be supersedable, though not actually superseded, he may be charged with a declaration at the suit of a new plaintiff. 2 Burr. 1048. *Hutchins v. Kerrick*.

Order as to charging prisoner in custody of the marshal by way of detainer for a new plaintiff.

For preventing the detainer of prisoners charged by declarations in the custody of the marshal of the Marshalsea of this court, where the cause of action against such prisoner does not amount to $\text{20}l.$; it is ordered, that no declaration, whereby any prisoner shall be charged in the custody of the marshal, shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff's cause of action against such prisoner does amount to $\text{20}l.$ or upwards, shall be first made and filed with the clerk of the rules of this court, and the sum specified in such affidavit shall be indorsed by him upon such declaration, before leaving thereof with the turnkey. R. E. 15 Geo. 2. This rule is confined to cases where the prisoner is charged with a new action.

Service of a latitat at eight in the evening on the return-day, is good.

Rule to shew cause why proceedings should not be set aside for irregularity. It appeared that the defendant was in custody at the suit of same plaintiff for another cause of action. The *lat.* in this second action (which was not bailable) was returnable on the 28th of January, 1786. On that day the declaration was left in the office, though writ not served till eight that evening. Motion 13th May. *Buller, J.* In *Ward and Wilkinson* the court refused to set aside the proceedings, though the notice of declaration was not served until half past ten at night. 2 Burr. 812. Besides, the defendant should have made his application sooner; he is now out of time. If a prisoner be entitled to be superseded, he must always apply for that purpose; but if he come on a mere irregularity, he is in the same situation with any other defendant. *Robertson v. Douglas*, 1 Term Rep. 191. N. B. The declaration need not be delivered to the de-

How to proceed for a debt not bailable

If the debt be in custody of the Marshal, and you would wish to proceed against him for a debt not bailable, file a bill against him, & deliver a copy to him in custody to be served in four days, in this case there needs no writ to remove the proceedings; demand the *Proces* in office, and if none sign the judgment. Sec 5th J. 286

fendant personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff, for the same cause of action: so determined in this case.

If the defendant is in custody of any gaoler, &c. for felony, upon producing the affidavit (sworn before a judge) of the debt, the judge's clerk will give you an order to detain him; in this case affidavit is filed with Messrs. *Provost and Chambre*, and sue out (or, if bill of *Middlesex*, with Mr. *Braithwaite*) as in other cases; take the writ to the sheriff and leave the order; pay 2s. 6d.

If the Defendant removes himself to the Fleet.

If a prisoner in custody of the sheriff, by virtue of process issued in this court, or in custody of the marshal before declaration delivered, removes himself to the Fleet prison, the plaintiff has his election to declare against him in this court, or in the Common Pleas; but, in order to declare against him upon the process issued in this court, he must bring him up into court by virtue of an *habeas corpus ad respondendum* to charge him with such declaration, which is directed to the warden, who returns same. (a) The former mode is the least expensive.

Removal before a declaration.

5 Term Rep. 35.

A new warrant is not necessary to prosecute.

As the law stands, the prisoner is not bound to give notice of his removal, but the plaintiff must take notice of it at his peril: therefore where a prisoner who had been surrendered in discharge of his bail, in this court, and afterwards removed to the Fleet, without having given any notice to the plaintiff, being charged in execution as a prisoner in the King's Bench, the court granted a supersedeas, saying, it would be putting difficulties on prisoners to oblige them to give notice. 2 Str. 1153. *Filkes v. Allen*. But the court are not aware of the expences these prisoners put the plaintiffs to in these cases by such removals. This is often done to harass the plaintiff. The expence is very near 5l.

Prisoner not bound to give notice to the plaintiff of his removal to the Fleet.

(a) But the court have no power under a *habeas corpus ad respondendum* directed to the gaoler of the house of correction, to charge a prisoner with a declaration on aailable writ, and recommit him to his former gaol. *Brandon v. Davis*, 9 East, 154. *Aliter* in the case of a heriff, or a gaoler of the court. *Ibid*.

If he be charged with a declaration and removes to the Fleet.

But if such prisoner be in the custody of the marshal, charged with a declaration in this court, and he afterwards removes himself to the Fleet, the plaintiff must proceed against him to final judgment in this court; and in order to charge him in execution, plaintiff must bring a writ of *habeas corpus ad satisfaciendum* directed to the warden of the Fleet, to bring him into this court, returnable on a day certain.

How to proceed by Original against the Defendant in custody of the Sheriff of any County.

If defendant is in custody of any sheriff, &c. upon a special *capias*, then declare against him by delivering a declaration only, on 4d. stamp paper, thus:

Declaration.

Surrey, to wit. *Richard Fenn*, late of, &c. yeoman, was attached to answer *John Denn* in a plea of trespass on the case, and whereupon the said *John Denn*, by J. J. his attorney complains, that whereas (as in other cases); you do not allege by original, in whose custody he is; but affidavit of the service is required, and proceed the same as by bill afterwards.

If in custody of the marshal.

If in custody of the marshal, declare against him, in the same manner, and do not allege him to be in the custody of the marshal.

When Prisoners entitled to be discharged.

Once supersedable, always so, it extends to same process.

The old rule that a prisoner who is once supersedable, always continues so, was insisted on. *Per Cur.*—It extends only to the same process; and where the nature of the charge is altered to a charge in execution, it is quite otherwise. *The London Assurance Company v. Perkins*, 1 Term Rep. 591.

If a prisoner is once supersedable, and does not take the advantage, he cannot do it after charged in execution.

Motion for a supersedeas for not proceeding to trial or judgment in due time. The arrest was in *August*, 1783, by the sheriff of Kent; 20th *November*, declaration delivered; 3d *February*, 1784, no plea, plaintiff signed interlocutory judgment "without a demand of plea;" on the 26th *February*, a plea was filed, defendant having removed himself to the K. B.; 15th *July*, plaintiff waived the judgment (there being a dispute respecting the regularity), and gave notice of trial; in *Michaelmas* term following, plaintiff signed judgment, and the day after, charged defendant in execution. *Palmer* shewed cause, and contended a demand of plea was unnecessary, (except when

the defendant was in court); and if entitled to be superseded, he ought to have applied in time. *Buller, J.* In the case of a prisoner in this court there must be a demand of plea. If he is in the custody of the sheriff no demand is necessary. If a prisoner be supersedable for any irregularity, as for want of the demand of a plea, he cannot take advantage of that, after he is charged in execution, supposing he has any opportunity of applying on that ground, before he is charged in execution. Now here the defendant had ample time; for judgment was signed in *Michaelmas* term, 1784, and he might have applied in *Trinity* term following.—Rule discharged. *Ross v. Christfield*, 1 *Term Rep.* 591.

The latitat was returnable first return of *Easter*, declaration was delivered 30th *June*, but no bill filed till 3d *July*, defendant pleaded on same 3d *July*: Motion to discharge him, on the ground that a prisoner once supersedable is always so. Lord Kenyon. Where there has been an irregularity, if the party overlook it, and take steps in the cause, he cannot afterwards revert back to the irregularity, and object to it. Rule discharged. *Pearson v. Rawlings*, 1 *East*, 78.

If a prisoner plead, he cannot take advantage of a bill not being filed at time the declaration delivered;

The 6th *Nov.* 1803, defendant was committed to the custody of the marshal, on a writ then returnable, a declaration was delivered 11th *February*, to defendant in custody; 23d *April* interlocutory judgment was signed for want of a plea. A rule was obtained, *Trin.* term, 1803, to discharge defendant, no bill being filed. Court—There can be no declaration if there be no bill filed before. Therefore the delivery of the declaration was a nullity. Rule absolute. *Roswell v. Bingham*, 4 *East*, 16.

When declaration may be treated as a nullity.

So if the declaration be written on both sides the stamp-paper. *Champneys v. Hamlin*, 12 *East*, 294.

How to discharge for want of Declaration.

To discharge a prisoner on the plaintiff's not declaring in due time, if in custody of the sheriff, &c. get a certificate from the gaoler of the causes he is charged with, and an affidavit of his having signed same: then take out a summons from a judge, to shew cause why a writ of supersedeas should not issue to discharge the defendant; serve same on plaintiff's attorney, and if he does not attend, make affidavit of such service and attendance

How to discharge prisoner for want of declaring in a county gaol.

thereon, (as there is but one summons necessary), (a) and then the judge will grant an order for a supersedeas, upon filing common bail, and the memorandum on a 5s. stamp is filed with Mr. *Smith*: pay summons in term 1s. vacation 2s. order 4s. common bail 1s. 6d. supersedeas, signing 1s. 8d. seal 7d. If no bill be filed, you must obtain a certificate from the clerk of the declarations, to produce to the judge.

How if in Custody of the Marshal.

If in custody of the marshal.

If the defendant is in custody of the marshal, apply to the clerk of the papers of the King's Bench prison, for a copy of the causes whereon he stands charged, then take out summons as before, and serve it on plaintiff's attorney; if he does not attend, an order will be made upon filing common bail, and the marshal (upon the clerk of the common bail's certificate) will discharge the defendant without a supersedeas; pay for it 1s.

If by original.

If the action be by original, then proceed as above, and when you have got the order, file an appearance with the filazer, pay 3s. 6d. and make out a supersedeas thereon on a 5s. stamp; pay signing 2s. 10d. seal 7d. if in custody of the sheriff: if in custody of the marshal, he will certify to him, the same as by bill; pay him for certificate 1s.

If a supersedeas be had before judgment, yet plaintiff may have execution; aliter for want of charging in execution.

If the defendant be superseded for want of proceedings before judgment, yet the plaintiff may, after judgment obtained, take him in execution; but otherwise, if defendant supersede for want of charging in execution. N. on R. T. 2 Geo. 1. S. P. *Line v. Low*. 7 East, 330. Cas. in Pract. C. B. 136. S. P. If defendant has removed himself before declaration to the Fleet, the summons must be taken out in the Common Pleas to discharge.

How for want of proceeding to Trial or Judgment.

Counsel's hand not being set to a replication, Mr. *J. Buller* discharged the prisoner; counsel's hand in this case was requisite.

(a) An attendance half an hour next immediately following the return of the summons, sufficient: formerly an hour. R. T. 35 Geo. 3. 6 Term Rep. 402.

Ordered, that in all cases after a declaration delivered as aforesaid at the King's Bench, or any other gaol or prison, unless the plaintiff shall proceed to trial, or final judgment (a) thereupon, within three terms next after such declaration delivered, (if by the course of this court the plaintiff can so proceed,) of which three terms the term wherein such declaration shall be delivered shall be taken to be one. *vide page 798* -

The different parts of the rule apply to different cases : Explanation, if there be a trial, the plaintiff must proceed to judgment, and charge the prisoner in execution within two terms after such trial; if there be no trial, then within two terms after final judgment. 4 East, 350.

This rule superseding a prisoner against whom the plaintiff shall not proceed to trial or final judgment within three terms after declaration delivered, does not attach in a case where there are two defendants, one of whom suffered judgment by default, and the other pleaded to issue; the trial of such issue being had within the third term, though the costs were not taxed, nor final judgment in fact signed till after that term; but then entered according to the course of the court as of that term. *Wigglesworth and another v. Wright and another*, 13 East, 167.

Or in case of a surrender in discharge of bail, after a declaration delivered, unless the plaintiff shall proceed to trial or final judgment thereupon, within three terms next after such surrender, and due notice thereof, (if by the course of the court, plaintiff can so proceed,) of which three terms, the term wherein such surrender shall be made shall be taken to be one, the prisoner shall be discharged out of custody by writ of supersedeas, to be granted by this court, or one of the judges upon filing common bail, unless upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

And in all cases where such trial shall be had, or final judgment obtained against any prisoner in the custody of the marshal, or in any other gaol or prison, unless the plaintiff shall cause such prisoner to be charged in execution within two terms next after such trial shall be had, or final judgment shall be obtained (of which two terms

When entitled for want of proceeding to trial or judgment.

To what this rule does not attach.

In case of a surrender within three terms, prisoner shall be discharged.

After trial had, to be charged in execution in two terms after trial or final judgment.

(a) Final judgment there means, final judgment without trial. 4 East, 350. *Heaton v. Whitaker*.

the term in which such trial shall be had, or final judgment shall be obtained, shall be taken to be one), in case no writ of error shall be depending, no injunction be obtained for stay of proceedings.

If any writ of error or injunction, then within two terms after affirmance, &c.

And if any writ of error shall be depending, or injunction obtained, then within two terms next after judgment shall be affirmed, the writ of error be nonprossed or discontinued, or the injunction dissolved, including the term in which such affirmance of judgment, nonpross, or discontinuance of the writ of error, or dissolution of the injunction shall be obtained.

In case of surrender after trial had, or final judgment to be charged in execution in two terms next after surrender and notice.

Or in case of a surrender in discharge of bail after trial had, or final judgment obtained, unless the plaintiff shall cause the defendant to be charged in execution *within two terms* next after such surrender and due notice thereof; of which two terms, the term wherein such surrender shall be made, shall be taken to be one, in case no writ of error shall be depending, nor injunction obtained for stay of proceedings; and if any writ of error shall be pending, or injunction obtained, then within two terms next after judgment shall be affirmed, the writ of error be nonprossed or discontinued, or the injunction dissolved, including the term in which such affirmance of judgment, nonpross, or discontinuance of the writ of error or dissolution of injunction, shall be obtained, and the prisoner shall be discharged out of custody by superseas to be granted as aforesaid, on filing common bail: unless, upon notice given to the plaintiff's attorney, good cause shall be shewn in either of these cases to the contrary. . R. H. T. 26 Geo. 3. The rule of *Trin. 2 Geo. 1.* is now at an end. (a)

If declaration is delivered in *Hilary*, the plaintiff must sign final judgment the last day of Trinity term, and charge the defendant in execution, the *last day* of Michaelmas term, (unless error or injunction.)

In country causes, and also such as are tried at the sittings after term in *London* and *Middlesex*, the two terms allowed a plaintiff for charging the prisoner in execution after trial, must be computed from the term wherein the *distringas juratorum* is returnable, inclusively to the end of the following term, after which the defendant will become

(a) A render in vacation and before the *essoign-day* of the next term, is considered a render of that term.

supersedeable immediately after the following *Trinity* term; or if at the *summer* assizes immediately after the following *Hilary* term, if not previously charged in execution; but should a plaintiff proceed to trial, at the sitting within term, in *London* or *Middlesex*, the defendant must be charged in execution in the following term, or he will become supersedeable.

Defendant was arrested on a writ returnable first return of *Michaelmas* term 1801, and went to prison; declaration delivered in *Hilary* 1802, cause tried at same Lent assizes. Final judgment signed *Trinity* term, and the defendant was not charged in execution till *Michaelmas* 1802. Rule to discharge defendant out of custody, not having been charged in execution in due time. Court—If there be a trial, the plaintiff must proceed to judgment, and charge the prisoner in execution within two terms after such trial; if there be no trial, then within two terms after final judgment. Here a trial was had, and the defendant was not charged in execution within two terms after such trial had. Rule absolute. *Heaton v. Whitaker*, 5 East, 349. The charging in execution within two terms after final judgment, are inclusive of the term of trial, or final judgment respectively.

Verdict Lent assizes, 1796, the 8th of *April* following being in the same vacation, defendant rendered, and in *Easter* term following, final judgment was signed. Mr. J. Lawrence discharged the defendant for want of being charged in execution in the same *Easter* term. Motion to quash the supersedeas, and for liberty to sue out execution. Court held, that where the defendant surrenders in the same vacation as the verdict was obtained, there the preceding term is not reckoned as one of the two terms. Rule absolute. *Smith v. Jeffreys*, 6 Term Rep. 776.

But when he surrenders in the vacation after final judgment signed, the term in which judgment is signed, is reckoned as one of the terms which the plaintiff must charge him in execution. *Ibid*, 777.

If a defendant has been once discharged out of execution upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution. *Vigers v. Aldrick*, 4 Burr. 2482.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to

If a declaration be delivered of *Hilary*, and plaintiff proceed to trial at those assizes, and sign judgment in *Trinity* term, defendant must be charged in *Trinity* term, and not *Michaelmas*.

Surrender in *Hilary* vacation after verdict, the preceding term not reckoned.

If he surrender after final judgment signed.

Once discharged cannot be taken again.

Nor if he takes a new

security, if it becomes bad by the act of the plaintiff.

satisfy the judgment, and that security is afterwards defeated on account of mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jacques v. Wilhy*, 1 Term Rep. 557.

How for not proceeding to Judgment, and charging in Execution, in Custody of the Sheriff.

How to discharge defendant for not proceeding to judgment and execution in custody of the sheriff.

To proceed to discharge the prisoner for not proceeding to judgment, or charging in execution in due time, apply, if the defendant is in custody of the sheriff, to the gaoler for a copy of causes; get an affidavit of his having signed the same, and that the name thereto is his handwriting; then take out a summons at a judge's chambers to shew cause, which serve on plaintiff's attorney. If he does not attend, you will upon the third summons, have an order of course, on an affidavit of the service and due attendance; but if he should attend, and it is a country cause at a distance, the first is an order *nisi*, within a limited time; giving time to the agent to write to his client, and then an order absolute, if no cause shews; the agents in town generally indorse the summons, unless cause shewn in a week, &c. The order in either case being made, issue out a writ of supersedeas for his discharge: for the form of which, see p. 732.

On issuing a supersedeas in this case, file a memorandum or warrant on a 5s. stamp, as directed by stat. 25 Geo. 3. c. 80.

As to where a writ of error brought.

If the plaintiff recover a judgment against two defendants in the King's Bench, and one of them bring error in the Exchequer-chamber, the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of King's Bench, notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants. *Laroche v. Wasbrough & an.* 2 Term Rep. 737.

Court permitted an alteration in the committitur-piece, although filed.

In such case where the judgment was affirmed in the Exchequer-chamber, and costs given of the writ of error, and both defendants were taken under a writ of execution on the whole sum including the costs of the writ of error, as well as the original sum recovered, this court permitted the plaintiff to amend his committitur in execution as to the defendant, who did not join in the writ of error, by altering it to the original sum recovered. *Ibid.* If there be a removal after declaration, and defendant is to

If there be a removal after declaration.

be discharged for want of proceeding to trial or judgment, the court where the declaration is, will discharge him.

In Custody of the Marshal.

If the defendant be in custody of the marshal, then get a copy of the causes from the clerk of the papers of the King's Bench prison, (no affidavit is necessary of his signing,) take out summons as before, and attend; if you obtain an order, file common bail with the clerk of the common bails if by bill, (if by original, enter appearance with, and obtain a certificate of the filazer,) who will give certificate for the discharge.

If the defendant be in custody of the marshal.

If by original.

In the King's Bench.

A. B. plaintiff,
and

C. D. defendant.

J. C. of, &c. gent. maketh oath and saith, That he did, on the day of instant, serve a true copy of the summons hereto annexed, on Mr. H. I. who acts as attorney or agent for the plaintiff in this cause, by leaving the same at the house of the said H. I. in with the clerk or servant there. And this deponent further saith, that he did also serve Mr. H. I. with another true copy of the said summons hereto annexed, on the day of instant, by leaving the same with the clerk or servant of the said H. I. at his house aforesaid. And this deponent did also, on the day of instant, personally serve the said H. I. with a true copy of the said summons hereto annexed. And this deponent further saith, that he did, on the three several days mentioned in the said summons, duly attend at the chambers of the (a) right honourable *Edward Lord Ellenborough*, in Serjeant's Inn, *Chancery-lane, London*, but that the said H. I. nor any one for him, did not on any or either of the said three several days or times aforesaid attend on the said summons.

Affidavit of service of the summons.

(a) Honourable Mr. Justice Bayley.

It is very common to save this affidavit and the three summonses, by getting plaintiff's attorney to attend the summons. If it is a country cause, the order will be, unless cause be shewn in a reasonable time, (generally a week.)

May get plaintiff's attorney to consent.

It is improper to take a *cognovit* from a prisoner without his attorney being present, and if done, the proceeding should be

Attorney should be

present on
prisoner's
signing a
cognovit.

Hab. corp.
brought by
plaintiff to re-
move his pri-
soner quashed.

ings may, on that ground, be set aside, but not for irregularity. *Parkinson v. Caines*, 3 Term Rep. 616.

The plaintiff arrested defendant in the Marshalsea court, and had him in custody there; the plaintiff brought a *habeas corpus* to remove him into the King's Bench to charge him with the same demand. Motion to quash the writ was made absolute. *Melsome v. Gardner*, Comp. Rep. 116.

Writ of Supersedeas.

What.

This writ is a command to stay or forbear some ordinary proceedings in law, which in appearance ought to be done, or pursued, were it not for the cause whereon it is granted.

Supersedeas
for not de-
claring; ss.
stamp.

(a) The return
of the writ.

George the third, &c. to the sheriff of *Kent*, greeting: Whereas it was lately commanded, that you should take C. D. if he might be found in your bailiwick, and keep him safely, so that you might have his body before us at *Westminster*, on (a) next after answer to A. B. in a plea of trespass, and also to a bill of the said A. B. to be exhibited against the said C. D. for 100l. upon promises, according, &c. and because the said C. D. came into our court before us, and hath filed *common bail* in the said action, and the said A. B. hath not declared against him, within two terms next after the said taking; therefore we command you, that you wholly cease from taking, arresting, or imprisoning the said C. D. or any ways molesting him on that occasion, and no other; and if you have taken him on that account, and no other, and do detain him, that then you cause him to be delivered without delay, from the prison wherein he is so detained, at your peril. Witness *Edward* Lord *Ellenborough* at *Westminster*, the day of in the 57th year of our reign.

Law and Martin.

Præcipe.

Kent (ss) *Supersedeas* for C. D. ats. *John Dens.*

I. G. attorney.

Pay signing with Messrs. *Provost and Chambre* 1s. 6d. seal 7d. sheriff's fee in *London* and *Middlesex* 2s. 6d.

By original.

The above supersedeas will do by original, only go as far as a plea of trespass, and add, on the case on promises to the said A. his damage of fifty pounds; and because the said C. D. came into our court before us, and appeared in the said action, and the said A. not having &c.

clared, &c. as above. Pay signing with the filazer, 2s. 10d. seal 7d.

George the third, &c. to the sheriff of *Oxfordshire*, greeting: Whereas A. B. is detained in our prison, under your custody, by virtue of a certain writ of *latitat*, returnable on, &c. to answer C. D. in a plea of trespass, and also to a bill of, &c. And whereas the said A. afterwards, in ——— term last past, was charged with a declaration at the suit of the said C. in the plea aforesaid; but because it appears to us that the said A. hath filed common bail to answer the said C. in the plea aforesaid, and that the said C. hath not proceeded to judgment against the said A. within three terms next after the delivery of the said declaration, as required by the rules of our said court; we command you, that you wholly cease from taking, &c. as in the other.

The like for not proceeding to trial and judgment; &c. stamp.

George, &c. as in the other, as far as "plea aforesaid," then say, "and because the said C. hath not proceeded to charge the said A. in execution, within two terms next after judgment obtained, according to the rules of our said court, before us, we therefore command you, that you wholly cease," (as in the other.)

For not charging defendant in execution.

Say (after recital of the writ,) and because it sufficiently appears to our said court before us, that the said C. hath found sufficient bail, to answer the said A. in the plea aforesaid; therefore we command you, that if the said C. is detained in our said prison in your custody, by occasion of the said action, and no other, then you permit him to go at large, as you will answer the contrary at your peril. Witness, &c.

On putting in good bail.

Of the Habeas Corpus ad respondendum. vide the Manual

A-25

An *habeas corpus ad respondendum*, is when any one is imprisoned at the suit of another, upon a legal process in the Fleet or any other prison, (except the King's Bench prison,) and a third person would sue that prisoner in the court of K. B. and cannot because he is not in custody of the marshal. In this case he may have this writ to remove him out of the prison where he is, into this court, returnable at a day certain, to answer the plaintiff in this action here.

The first thing to be done is, to prepare an affidavit of the debt, get it sworn before one of the judges of this court, then sue out a writ of hab. corp. ad respondendum,

directed to the proper gaoler, in whose custody defendant is, sign it with Messrs. *Provost* and *Chambre*, and seal it, leave it with the gaoler, for the return, it is to be made returnable on a day certain, pay for the return, attend at *Westminster* on the return day, and have a declaration prepared ready ingrossed to give the master in court, with the affidavit of the debt, and he will charge the defendant therewith.

N. B. A bill should be filed, and rule to plead given as in other cases, and demand of plea made.

The habeas corpus ad respondendum,

George the third, &c. To the warden of our prison of the Fleet, greeting: We command you, that you have the body of C. D. detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before us at *Westminster*, on next after to answer A. B. in a plea of trespass, and also to a bill of the said A. B. to be exhibited against the said C. D. for 50l. upon promises, and then and there to do and receive all and singular those things which our said court before us shall then and there consider of him in this behalf; and have you there then this writ. Witness *Edward Lord Ellenborough* at *Westminster*, the day of in the 57th year of our reign.
Law and Markham.

Oath for 25l. }
per affidavit filed, } J. K. attorney.

DEBTORS IN EXECUTION.

If debtor be charged in execution for any sum not exceeding 100l. how to proceed.

By the stat. 32 *Geo.* 2. if any person shall be charged in execution for any sum not exceeding 100l. and minded to deliver up to the plaintiff all his estate, he may before the end of the first term which shall be next after he shall be charged in execution (a), exhibit a petition to any court from whence the process issued, upon which any such prisoner was or were taken and charged in execution as aforesaid, or into the court, or where he is removed by habeas corpus, setting forth not only a true

(a) The act does not extend to *qui tam* actions. *Burr.* 1322. *Black.* 372.

account of his real and personal estate, which he, or any trust for him, is, was, or were entitled to, at the time of his petitioning; and of all incumbrances affecting same, but also a true account of all the real and personal state which he, or any person in trust for him, or for his use, was or were interested in, or entitled to, at the time of his first imprisonment, either in possession, reversion, remainder, or expectancy, to the best of his belief; and the sureties, bonds, notes, and books relating hereto, with the names and places of abode of the witnesses. And before it be received, such prisoner shall give or leave, or cause, &c. unto and for all and every the creditors at whose suit he shall stand charged in execution, or his or her executors, &c. at his or their usual place of abode, or to or for his attorney or agent last employed in any such action, in case any such creditor cannot be met with, but not otherwise, fourteen days at least before any such petition shall be presented and received, a notice in writing, signed with the proper name or mark of such prisoner, importing therein, "That such prisoner doth intend to petition the court as aforesaid. And also setting forth a true copy of the account or schedule, including the whole real and personal estate which he doth intend to deliver (other than and except the necessary wearing apparel and bedding of the prisoner, and his, her, or their family, and the tools or instruments of his trade or calling, not exceeding 10l. in the whole.)"

Certifying there the cause of his imprisonment.

Fourteen days previous notice, &c.

Affidavit of service to be left with petition, and read: and a rule to be made for bringing the prisoner into court, and summoning the creditor to appear personally, or by attorney, at some certain day to be specified; and the creditor appearing or not in person, or by attorney, then upon affidavit of the due service thereof being made on him, or his attorney, if any such creditor, his, her, or their executors, &c. cannot be met with, such court shall examine into the matter, and order an assignment of his effects. But if the creditor shew cause, and desire further time to inform himself, court may remand the prisoner, and direct him to appear, &c. on some other day at furthest within the first week of the next term, but sooner if court think fit. And all objections which shall be made in form against prisoner's schedule, shall be made only the first time he shall be brought up. And if creditor doth not appear on second day, &c. or appearing, and shall not be able to discover any effects omitted,

Affidavit of the service of such notice to be delivered with the petition; and a rule to be made, &c.

Creditor disbelieving the oath, &c.

Objection to schedule.

then prisoner to be discharged on executing an assignment of his estate and effects, unless the creditor agree by writing signed to pay 2s. 4d. as the court shall think fit, to be paid Monday in every week, so long as he shall continue in prison at his suit. But upon failure of payment, the prisoner, on application, to be discharged, &c. Where more creditors than one insist on the prisoner's detention, they are to pay him each, not exceeding 1s. 6d. Sect. 14. (a)

And the creditor may compel such debtor so charged in execution, to make a discovery and surrender of all his effects for their benefit, on pain of transportation.

If creditor be dead.

It is no objection to a prisoner's discharge, that his creditor is dead, 1 *Bos. and P.* 336; or that the defendant has agreed not to take the benefit of the act 3 *Smith's R.* 51.

A prisoner who has lost the benefit of the lords act, 32 Geo. 2. c. 28, by the misconduct of an agent, may be discharged under 26 Geo. 3.

The defendant was charged in execution 16th October, 1789. *Michaelmas* term following he had given the proper notice to plaintiffs to be discharged under the lords act, 32 Geo. 2. but having employed an agent to pursue the subsequent steps necessary to entitle himself to take advantage of the act, which the agent had failed to do, he had been in consequence remanded. In *Michaelmas* term, 1790, he made a similar application by virtue of 26 Geo. 3. c. 44. the only question was, whether under the fifth section he could make oath that he had neglected to take advantage of the former statute from ignorance or mistake. Lord *Kenyon* said, even if the neglect arose from the misconduct, and not merely from the ignorance or mistake of a third person, I should think that as to the party himself it was fairly referable to the words and meaning of the act; as to him it may be called ignorance or mistake if he fairly meant to do what the law required of him. And *Buller, J.* said, even if the neglect were wilful on the part of the agent employed, yet if the defendant were not privy to it, but did every thing in his power to comply with the requisitions of the act, it is as to him imputable to mistake. Ordered, that the prisoner be brought up. *Pearce & an. v. Taylor*, 4 *Term Rep.* 231.

(a) Yet the creditor may at any future time have execution against the lands and goods of defendant, though never more against his person.

By stat. 33 Geo. 3. c. 5. Every person that now or hereafter shall be in execution for any sum not exceeding 300l. shall be entitled to the same relief as by the above recited act.

New act extending it to 300l.

That every creditor or creditors, his or their executors, &c. at whose suit any debtor shall be charged in execution for any sum not exceeding 300l. shall have such remedy by compelling such debtor to deliver up his or her estate and effects for the benefit of his or her creditors as is provided by the 32 Geo. 2. in cases where the sum for which such debtor shall be in execution, does not exceed 300l. Sect. 3.

Creditor to have the like remedy as in former act to compel debtor to give up his estate.

This act extends to persons not paying money awarded, and not paying costs duly and regularly taxed and allowed by the proper officer after proper demands made for that purpose; and also upon any writ of *excommunicato capiendo*, or other process for or grounded on the non-payment of costs or expences, in any cause or proceeding in any ecclesiastical court. Sect. 4. (a)

Extends to nonpayment of costs taxed.

That where any debtor as aforesaid shall have neglected, or shall neglect to take the benefit of the 32 Geo. 2. or of this act within the time limited by the said act, or this act, and shall make it appear to the court out of which such execution issued, that such neglect arose from ignorance or mistake, such debtor shall then be entitled to take the benefit of the said act, or of this act, as if he or she had taken the same within the time by the said act, or this act, so limited as aforesaid: provided that it shall be lawful for any creditor, &c. at whose suit any debtor shall be so in execution, to file any interrogatories for the examination of such prisoner before his or her being admitted to take the benefit of this or the before recited act; that this act shall not extend to any debt owing to the crown, nor shall it affect any proceeding which at any time may be lawfully had under or by virtue of any commission of bankrupt: nor shall it extend to Scotland; and to continue and be in

If debtor neglects to take the benefit of 32 Geo. 2. or of this act in time, and shall make it appear to the court.

Not to extend to debts owing to the crown.

Nor to affect proceedings under a commission of bankrupt.

(a) This act does not extend to a writ of *excommunicato capiendo* for contumacy in not paying a sum of money for alimony, and also for costs, 10 East, 231. *Rex v. Samson*. Nor to a *qui tam* action. 3 Burr. 1322. 1 Bl. R. 372. S. C. These acts extend to inferior courts. 7 East, 84.

force for five years, and from thence to the end of the then next session of parliament, and no longer. Sect. 5.

The former allowance of 2s. 4d. is repealed, and 3s. 6d. to be paid.

By stat. 37 Geo. 3. c. 85. sect. 4. The weekly allowance to be made prisoners by the 32 Geo. 2. is repealed; and by sect. 3. of this act, prisoners taking the benefit are now to be allowed 3s. 6d. weekly, to be paid as the former allowance is directed, by 32 Geo. 2. And by sect. 4. where more creditors than one insist on the prisoner's detention, they are each to pay him, not exceeding 2s. weekly, on every Monday, in every week. This act is made perpetual by 39 Geo. 3. ch. 50.

In the King's Bench.

A. B.

v.

C. D.

A. B.

The notice.

Take notice that I intend, after the expiration of fourteen days from the date hereof (or so soon after as I can be heard,) to petition his majesty's court of King's Bench at *Westminster*, for such relief and benefit as I am entitled to by virtue of an act of parliament made and passed in the 32d year of the reign of his late majesty king *George* the second, intituled, "an act for the relief of debtors with respect to the imprisonment of their persons," &c. and also of an act made and passed in the 35d year of the reign of his present majesty, intituled, "an act for the further relief of debtors," &c. and also of an act made and passed in the 37th year of the reign of his present majesty, intituled, "an act to amend so much of the first mentioned act, as relates to the weekly sums thereby directed to be paid to prisoners in execution for debt, in the cases therein mentioned;" and that I have no debts, estates, or effects whatsoever, nor had I at the time of my first imprisonment in this action, or at any time since, either in possession, reversion, remainder, or expectancy, other than and except (a) what is contained in the schedule or inventory hereunder written, the necessary wearing apparel and bedding for myself and family, and the tools or instruments of my trade or calling, not exceeding the sum of 10l. in value in the whole; as witness my hand this day of 1817. (a)

(a) If a schedule, add these words.

Witness, J. G.

R. F.

(a) The notice, petition, schedule, and several affidavits, are to be had at the clerk of the rules ready printed, and if filled up, will save a great deal of trouble, as the forms are perfect.

A schedule or inventory of all the estate and effects Schedule.
 which I R. F. a prisoner in execution, in the custody of
 (b) J. B. Esq. sheriff of the county of Berks, at the suit of J. D. or any person or persons in trust for me, was or
 were possessed of, or entitled unto, at the time of my first (b) The marshal of the Marshalsea.
 imprisonment, at the suit of the said J. D. or at any time
 since, either in possession, reversion, remainder, or expectancy, other than and except the necessary wearing
 apparel and bedding of or for me and my family, and the
 tools or instruments of my trade or calling, not exceeding 10l. in value in the whole; as witness my hand this
 day of 1817. R. F.

Real estate.—I have none, either in possession, reversion, remainder, or otherwise.

Goods.—One old chair; six pewter plates.

Debts.—J. W. of Oxford, labourer, £2 0 0
 Witness, J. G. R. F.

To the Right Honourable *Edward Lord Ellenborough*,
 Lord Chief Justice of his Majesty's Court of King's
 Bench at Westminster, and the rest of the Justices of
 the same court.

The humble Petition of *Richard Fenn*,
 Sheweth,

That your petitioner is a prisoner in (a) his majesty's Petition.
 gaol in and for the county of Berks, charged in execution (a) The custody of the marshal of the Marshalsea.
 at the suit of *John Denn*, for the sum of 40l. debt and
 53s. damages, as by the certificate annexed more fully
 appears.

That your petitioner humbly apprehends he is entitled
 to the benefit of an act of parliament, made and passed
 in the 32d year of the reign of his late majesty king *George*
the second, intituled, "An act for the relief of debtors, with
 respect to the imprisonment of their persons, &c." and also
 of an act made and passed in the 33d year of the reign of
 his present majesty, intituled, "An act for the further relief
 of debtors, &c." and also of an act made and passed in the
 37th year of the reign of his present majesty, intituled,
 "An act to amend so much of the first mentioned act as
 relates to the weekly sums thereby directed to be paid to
 prisoners in execution for debt, in cases therein men-
 tioned."

That your petitioner hath not at the time of exhibiting
 this his petition, nor had he at the time of his imprison-
 ment in this action, or at any time since, any debts, estates,
 or effects whatsoever, either in possession, reversion,

(a) If a schedule. remainder, or expectancy, other than and except (a) what are mentioned and contained in the schedule or inventory hereunto annexed, and the necessary wearing apparel and bedding for himself and family, and the tools or instruments of his trade and calling, not exceeding the sum of ten pounds in value in the whole, and your petitioner being willing and desirous to conform himself to the direction of the said several acts, most humbly prays your lordships to grant a rule or order of this honourable court, for the plaintiff to shew cause why he should not be discharged pursuant to the said acts, and as in duty bound, your petitioner will ever pray, &c. R. F.

If there is a schedule, entitle it thus, A schedule or inventory of all the estate and effects which I R. F. a prisoner in execution in the custody of the sheriff of the county of *Berks* at the suit of *John Denn*, or any person or persons in trust for me was or were possessed of, or entitled unto, at the time of my first imprisonment, at the suit of the said *John Denn*, or at any time since, either in possession, reversion, remainder, or expectancy, other than and except the necessary wearing apparel and bedding of or for me or my family, and the tools or instruments of my trade or calling not exceeding ten pounds in value in the whole; as witness my hand this day of 1817.

Here state the things particularly; if notes or bills, the dates and sums.

N. B. This petition will serve for a prisoner in custody of the marshal.

Affidavit to be annexed.

Put the title of the cause.

J. G. of, &c. gentleman, maketh oath and saith, That he was present, and did see R. F. the above-named defendant sign his name (or mark), to the notice and schedule hereunto annexed, on the day of the date thereof, and also to a copy of the same; and that the name J. G. subscribed as a witness thereto is of the proper hand-writing of this deponent.

Affidavit of service of the notice and schedule.

A. B. of, &c. maketh oath and saith, that he this deponent did, on the day of instant, serve the above-named plaintiff A. B. with a true copy of the notice (and schedule hereunto annexed,) by delivering the same to E. the wife of the said A. B. at his dwelling-house, or place of abode, situate in in the county of of

Prisoners are brought up for this purpose at half-past

nine in the morning at *Westminster-hall*, *Mondays* and *Wednesdays*.

If defendant be in custody of any other gaoler (except the marshal), then there must be an affidavit of seeing the gaoler sign the certificate, which will be as follows (and the affidavit of the service of the rule, as well as that of seeing the gaoler's certificate signed, may be included in one affidavit):

A. B. of, &c. maketh oath and saith, that he this depo- **Affidavit of**
nent did on the day of instant, (a) serve the **service of rule.**
above-named *John Denn* with a true copy of the rule
hereto annexed, by delivering the same to the wife of the
said *John Denn*, at his dwelling-house, or place of abode,
situate in in the county of

J. F. of, &c. maketh oath and saith, that he did see **Affidavit of**
A. D. the keeper of his majesty's gaol or prison of, &c. **seeing the**
sign the certificate hereto annexed, and that the name A. **gaoler sign the**
D. set and subscribed at the foot of the said certificate is **certificate.**
of the proper hand-writing of the said A. D.

If the defendant is to be discharged out of the custody **How to pro-**
of the marshal, the petition is to be left at the clerk of **ceed if in cus-**
he rules with an affidavit of defendant's signature sworn **tody of mar-**
before a judge, and also a certificate or copy of causes **shal.**
with which the defendant stands charged, is to be obtain-
ed from the clerk of the papers of the King's Bench prison,
and also an affidavit of the due service of the notice, who
will draw up the rule, which serve on the plaintiff, if he
is to be met with, if not his attorney, personally, and on
the marshal to bring the defendant into court, on the
day specified in the rule; make an affidavit of such ser-
vice, on plain paper, annexing the original rule thereto,
which affidavit you will have ready to produce in court,
on the day stated in the rule, if there is no objection, the
defendant will then be discharged of course on his taking
the oath required.

Ordered, that insolvent debtors, petitioning under the **To be brought**
ords' act, 32 Geo. 3. and subsequent acts for their further **up Mondays**
relief, shall be brought into court during term time upon **and Thurs-**
 Mondays and Thursdays, and upon no other days. R. *Hil.*
7 Geo. 3. 7 Term Rep. 454.

(a) Personally serve the above-named *John Denn* with
true copy of the rule hereto annexed.

If in a county
gaol.

If it be a country cause, then you obtain the gaoler's certificate of the cause the defendant stands charged with, and prepare an affidavit, which is to be ingrossed on unstamped paper, of having seen him sign same, then take the petition, the affidavit of service, and of the signature of the gaoler to the certificate, to the clerk of the rules for a rule to be drawn up for the defendant to be taken to the assizes for his discharge, pay for same 2s. 6d. serve a copy as before stated, and make affidavit of such service. Application is to be made to the clerk of the rules for the original petition, &c. to be taken to the assizes, who will let you have same on leaving copies with him.

If for the as-
sises,

When a prisoner is charged in execution above 20 miles from *Westminster-hall*, or the court out of which the execution issued, the rule requires him to be brought to the next assizes, and that the creditors be summoned to appear there; and a copy of such rule is to be served on every creditor, his executor, &c. or left at his or their dwelling house, or usual place of abode, or with his or their attorney, fourteen days at least before the holding of such assizes. s. 15.

Rule to be
served four-
teen days pre-
vious to as-
sises.

Court to ex-
amine,

On bringing up the prisoner the court or judge of assize are, in a summary way to examine into the matter of the petition, and after the defendant's being sworn as the act describes, if no opposition be made, he is discharged of course upon executing an assignment and conveyance of his estate and effects, which is done by a short indorsement on the back of the petition. s. 13.

Every thing
to be schedu-
led.

Every thing he can sell for his own benefit must be included in the schedule. 3 *Term Rep.* 681. As a life guardsman's place. *Ibid.* But not the half-pay of an officer in the army. *Ibid.* 3 *B. & P.* 324.

If plaintiff not
satisfied with
the truth of
defendant's
oath.

If the plaintiff is not satisfied with the truth of the oath of the prisoner, he, either personally or by attorney, may desire further time, and the court may remand him, and direct the parties to appear on some other day to be appointed of the court within the first week of the next term at farthest, s. 13, or sooner, 3 *Burr.* 1393. if the court shall think fit. And the creditor may file interrogatories for his examination, before he is admitted to take the benefit of the act. 33 *Geo. 3. c. 5. s. 5.*

Order to file
interrogato-
ries and have
a rule.

In such case, *it is ordered*, that the creditor is to file same with the clerk of the rules, and that he do thereupon draw up a rule for the debtor's examination before the master, to whom he shall also deliver the original inter-

rogatories: and that the debtor having been previously sworn in open court for the purpose, the master shall proceed to take down in writing, the examination of the debtor, in answer to the said interrogatories: and the same being signed by the debtor shall be afterwards filed by the master with the clerk of the rules; and the said interrogatories, and examination, shall be produced by the clerk of the rules and read, when the debtor shall on a subsequent day be brought up by rule for that purpose. *R. E. 36 Geo. 3.*

All objections as to the insufficiency of a prisoner's schedule of his effects in point of form, are to be made on the first attendance: the second time the prisoner is brought up, the plaintiff must be prepared to falsify the account given by defendant of his effects, if he can; if not, he will be discharged. Objections to the schedule in point of form, to be made the first time.

The 3s. 6d. must be made payable, and be paid every Monday, whatever may be the day on which the defendant is brought up to be discharged, and is remanded at the instance of the plaintiff. *Doughl. Rep. 68. Lench v. Pargitter.* And a judge's order made after term for his discharge is final. *Ibid.* Court said, in future let all the notes be made payable on the Monday. *Ibid. 69.* Groats must be made payable on every Monday.

In the King's Bench.

C. D. } I hereby promise to pay and allow to A. B. The note no
v. } 3s. 6d. per week, weekly on Monday in stamp.
A. B. } every week, for so long time as he shall
continue in prison, in execution at my suit; as witness
my hand, this day of 1817. C. D. (a)
Witness, J. G.

If the plaintiff cannot attend he may sign it, and his attorney may make affidavit of his having signed it in his presence (intituling the affidavit in the cause,) and his witnessing the same; and if delivered at the time of his discharge in court, it will do. It is now determined that no stamp for the note is necessary. *7 Term Rep. 671. Tekoll v. Casey.* So in all the courts, *contra Pilman v. Haynes*, same book 530. All the plaintiffs must sign the note. *7 Term Rep. 156. Rex v. Wilkinson.* The If the plaintiff cannot attend,

(a) The plaintiff's attorney cannot sign the note: it must be done by the plaintiff unless he be out of England. See *32 Geo. 2. c. 28. s. 13.*

first 3s. 6d. is to be paid in court at the time of the prisoner's discharge.

If affidavit be not intitled.

Where several plaintiffs.

Partners.

Lessors.

Executors.

Corporation.

The latest hour ten at night.

If the affidavit of seeing the note signed is not intituled in the cause, though the note is, it has been held not sufficient, 2 *Smith Rep.* 393. And where there are several plaintiffs, all must sign, 7 *T. R.* 156. 8 *Term Rep.* 325. Or if there are partners, by one on behalf of himself and others. 8 *T. R.* 25. A note signed by one of several lessors in ejectment, 7 *T. R.* 176. or by one of several executors, without mentioning the others, not sufficient. 8 *T. R.* 325. But in an action at the suit of a corporation, if the note be sealed with the corporation seal it is sufficient. 1 *N. R. C. P.* 306. And the note is valid though it do not state the style of the court in which the action is brought. 2 *Smith R.* 642. If payment be not made *in time*, the prisoner has a right to be discharged.

If payment be not made in time.

To be discharged if groats not paid by ten in the evening.

It appeared the groats had not been paid till a quarter past ten, and then given to the turnkey on the felon's side who received them; but defendant refused to accept them, saying, they had not been tendered in time. Motion for discharge; the court held that the tender came too late, and the latest hour still continues to be ten. They also held, that the turnkey on the felon's side was not the proper person who ought to have received the money; it must be the turnkey on the debtor's side. Prisoner discharged. *Fisher v. Bull*, 5 *Term Rep.* 36. see 1 *N. R.* 111.

French half crown.

The court held, that although the turnkey on the debtor's side received a French half-crown, which the defendant refused to accept, it was a good payment, the turnkey making no objection. *Ibid.* in note 37.

To be paid to turnkey.

I find now the money is to be paid to the turnkey only, and not the prisoner.

Fourteen days notice given, both days inclusive.

Prisoner discharged upon circumstances.

The prisoner had given notice in a former term, to be discharged pursuant to this act above fourteen days, but nothing being done therein, by reason that he had not annexed a schedule in the requisite form to the notice (though he had in reality no effects;) upon this discovery he gave a new notice, having then only thirteen days remaining, unless the first and last were both included; question was, whether he should be discharged? Mr. Justice Yates observed, that upon returns to writs of *mandamus* and *sci. fa.* the rule was, that there must be fifteen days between the teste and return, and yet in practice there were only fourteen days, one of the first or last always being included; so upon a *supersedeas* for

want of declaring before the end of two terms one of the two is always included. By analogy therefore to these instances, he thought the court might, in favour of liberty, make the computation in the present case, so as to include one of the days: he chose, however, to lay hold of the circumstance of the first notice, and said there was no surprise on the plaintiff, nor any intention of surprising him, though he acknowledged, that, strictly speaking, two insufficient notices could not amount to one good one. Mr. Justice Willes coming into the same sentiment, and the plaintiff's attorney not disputing it, the prisoner was discharged. 4 Burr. 2525. *Morley v. Vaughan*.

Defendant taken in execution on a *ca. sa.* returnable first return of *Michaelmas* term, sued out *Trin.* vacation 1790: he escaped from the officer, and was re-taken 20th November, and carried to the *Marshalsea* prison. In *Hilary* term, 31 Geo. 3. he applied to be brought up under the lords' act before Mr. J. Buller at his chambers, for the purpose of obtaining his discharge; but as there was a mistake in the notice, as to the name of the cause, he was remanded. Motion in *Trinity* term 31 Geo. 3. that he might be brought up. The court thought the application was made in time, for that the defendant could not be said to be charged in execution, until he was actually delivered over to the marshal: and that 26 Geo. 3. which was made *in pari materia*, contained a parliamentary exposition of the words "charged in execution," in the lords' act; for it directs all gaolers and keepers of prisons, to give notice of that act to all persons in their custody for debt within three days after such person shall have been committed or charged in execution. They therefore ordered the defendant to be brought up, and recommended him to amend the title to the notice. *Vaughan v. Durnell*, 4 Term Rep. 367.

Although a prisoner escape in execution, and be retaken, yet he may take the benefit of one of the acts.

A defendant in execution for contempt, and for the costs on a *quo warranto* information, may be discharged under the lords' act. The fine is merely nominal, and is now considered as a civil suit. *Rex v. Pickerill*, 4 Term Rep. 809. Vide *Cow.* 136. 1 Term Rep. 266.

If in for a contempt, and for costs on a *quo warranto*.

PROCEEDINGS BY HABEAS CORPUS. (a)

Habeas corpus.

There are several writs of *habeas corpus*, to which the subject is entitled by common right, when he is deprived of his liberty. But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, & recipiendum*, to do, submit to, and receive, what the judge or court awarding such writ shall consider in that behalf.

Enemy.

No *habeas corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 *Black. Rep.* 1324.

The writ of *habeas corpus* in civil cases is a judicial writ issuing out of this court, commanding the sheriff, or other officer to whom it is directed, to have the body of the defendant, together with the day and cause of taking and detaining him, before a judge at his chambers immediately after the receipt, to do and receive what the court or judge shall consider of him; it is called a *habeas corpus ad faciendum et recipiendum*, though more commonly an *habeas corpus cum causa*, and is granted of common right at all times, whether in term or vacation, without motion. 2 *Mod.* 306. This writ is brought for the removal of the body from the custody of the sheriff to the custody of the marshal; or to remove the case out of the inferior court into this; or may be had by bail, to bring up the defendant and render in their discharge.

Ha. corp. ad respondendum.

There are other writs of *habeas corpus* in civil cases, viz. the *habeas corpus ad respondendum*, which may be had by a third person against the defendant who is in custody of the warden or other gaoler, to remove him out of the prison where he is, into this court, to answer the plaintiff in the new action therein stated; and which writ is made returnable at a day certain in court.

Also the writ of *habeas corpus ad satisfaciendum* to bring the defendant from the prison of one court, into

(a) Writs of *habeas corpus* shall run into any liberties and into the counties palatine, the Cinque-ports, *Wales, Berwick, Guernsey, and Jersey*. 21 *Car. 2. c. 2. s. 11. Sid. 385. Cro. Jac. 543. 1 Mod. 20. Sid. 481.*

another court, in order to charge him in execution, upon a judgment against him, of the latter court.

There is also a writ of *habeas corpus ad testificandum*, Ha. corp. ad testificandum. to bring up a person in custody from the prison where he is, to give evidence on the part of the person who sues it.

How to remove the Body from the Custody of the Sheriff to the K. B. Prison.

A prisoner under criminal process in the house of correction cannot be brought up by *habeas corpus ad respondendum* for the purpose of being charged with a declaration on a bailable writ, and recommitted to his former custody so charged; for the court cannot make a gaoler of such prison liable for the escape of a prisoner on civil process. 9 East, 154.

If the defendant be already in custody of the sheriff under the process of this court, he has only to sue out a writ of *habeas corpus cum causa*, sign and seal same, then to leave it with the sheriff for a return. As soon as he has returned it, he will direct his warrant to his bailiff in whose custody he is, (or if in Newgate or any other gaol, to his gaoler) to bring him to the judge's chambers, who will on reading the return, commit him to the custody of the marshal.

This writ in the fifth year of Charles II. could not be made returnable immediately, or in the vacation, unless the party was in prison in *London* or *Middlesex*, or in order to deliver him over in discharge of his bail; but since the statute of 4 & 5 W. and M. c. 21. which gave liberty to a plaintiff (instead of bringing his prisoner to his court at the great expence of the writ of *habeas corpus ad respondendum*), to charge him with a declaration in prison, it has been determined, that in all civil suits, his writ may be had returnable immediately, before a judge at his chambers, and may now be sued out, without any previous motion made. Vide 3 Burr. 1876. And that the sheriff not obeying it, &c. will be subject to a penalty, and an attachment for his contempt. 2 Burr. 154.

How to proceed to remove from a gaol or spunging house, either on a writ issuing out of this court.

Formerly this writ could not be returnable immediately, unless, &c. but now may.

Attachment.

How to remove the Body from the Custody of the Sheriff, on a Common Pleas Writ, to the King's Bench Prison, or from an inferior Jurisdiction, &c.

If the defendant be detained on a writ out of the Common Pleas, and wishes to go to the King's Bench prison,

If defendant be detained on a writ from Common Pleas.

he must first obtain a writ out of this court for 10l. or upwards, against him at the suit of a new creditor ; in that case, an affidavit is to be made of the debt, and a writ sued out, directed to the sheriff in whose custody he is, then issue a habeas corpus, which sign and seal, and leave them both at the sheriff's office for a return.

If in an inferior jurisdiction.

If he is in custody in an inferior jurisdiction, as the sheriff's court of London, &c. then he may bring a habeas corpus in the first instance, without a writ being issued against him.

This writ cannot be had by the plaintiff to remove his own cause from an inferior court, for the same debt the defendant is detained. *Melsome v. Gardener*, Cow. Rep. 116.

How to sue it out.

The habeas corpus cum causa is now printed, on a 5s. stamp, and may be had at the stationers in blank, and is as follows :

Habeas corpus cum causa.

(a) The sheriff in whose custody defendant is.

George, &c. to the (a) sheriffs of London, greeting: we command you, that you have the body of C. D. detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before our right trusty and well-beloved *Edward Lord Ellenborough*, our chief justice, assigned to hold pleas in our court before us, at his chambers, situate in Serjeants-Inn, *Chancery-lane*, immediately after the receipt of this writ, to do and receive all and singular those things, which our said chief justice shall then and there consider of him, in this behalf, and have there then this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign.

J. K. attorney.

Law and Markham.

Præcipe.

London hab. corp. for C. D. to do and receive returnable immediately.

How to proceed.

To be signed by Messrs. *Provost and Chambre*, pay 6s. 8d. in term time ; vacation 7s. 8d. seal 7d. take it to the sheriff's office in whose custody the defendant is, he will make his return thereon, and make a warrant to his officer, to take the defendant before the chief justice, who will commit him ; pay 9s. 4d. for the first action, 2s. 4d. for every other, and 2s. 6d. for warrant to deliver, officer 10s. 6d. judge's clerk 8s. 6d.

The court will not compel the marshal to file of record,

a writ of habeas corpus cum causa by virtue of which a person is committed to his custody in execution. *Cooper v. Jones*, 2 *Maule and Selw.* 202.

Though this writ is returnable before the chief justice, yet any other of the judges may commit the prisoner to the King's Bench in his absence. Any judge may commit.

The above form will do for all counties, only direct it to the sheriff, &c. in whose custody the defendant is. The form of the writ will do in all counties.

If you remove a person from the country, the sheriff is paid 1s. per mile for bringing him to town, and the judge will not (it is said) commit the defendant, unless the sum is paid; but the officer must obey the writ, though the prisoner refuse to pay his fees. 2 *Str.* 814. Fees in the country.

Every prisoner who shall be committed to the custody of the marshal of this court, by virtue of any writ of *habeas corpus ad respondend.* or *ad faciend.* et *recipiend.* shall remain in actual custody of the said marshal by the space of two days next after such committal of such prisoner to the said marshal, notwithstanding any other writ of ha. corp. issuing out of any other court to the said marshal delivered and allowed. R. H. 5 W. and M. Prisoners committed to remain for two days notwithstanding any other writ of hab. corp.

If the defendant be returned in custody on a hab. corp. he is not to be discharged until he has justified his bail, which may be done any time before final judgment, and bail may for this purpose in vacation justify before a judge at his chambers. Defendant in custody not to be discharged till bail perfected.

How to remove the Cause from an inferior Court.

Before I proceed to shew how to remove the cause, it may be proper to state the several acts of parliament relating thereto; and first the act 21 *Jac.* 1. c. 23. being an act to avoid vexatious delays by the removal of frivolous cases, enacts, that where the judge of an inferior court is a barrister of three years standing, no cause shall be removed from thence by habeas corpus or other writ, except it be delivered before issue or demurrer joined in the said cause, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant to such action. *Sect.* 2. How to remove the cause from inferior courts. No suit shall be removed, unless writ be delivered before issue or demurrer joined.

That no cause, if once remanded to the inferior court by writ of *procedendo*, or otherwise, shall ever afterwards be again removed. *Sect.* 3. A suit once remanded, shall never afterwards be removed.

And that no cause shall be removed at all, if the debt Under &c. can-

not be removed.

or damages laid in the declaration do not amount to, or exceed, the sum of 5l. But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for 5l. or upwards (and then by the course of the court the habeas corpus removed both actions together,) it is, therefore, by statute 12 Geo. 1. c. 29. s. 3. enacted, that the inferior court may proceed in such actions as are under the value of 5l. notwithstanding other actions may be brought against the said defendant to a greater amount.

Writ of hab. corp. not to be allowed after one of the jurors sworn.

And in order to prevent delays being made in trying causes in inferior courts, which were frequently practised, by the stat. 43 El. c. 5. it is enacted, that such writ of habeas corpus shall be delivered to the judge before the jury have appeared, and one of them sworn to try the cause. *Sect. 2.*

No cause under 10l. to be removed into a superior court unless bail be given for the debt, &c.

By the 19 Geo. 3. c. 70. s. 6, it is enacted, that no cause where the cause of action shall not amount to 10l. or upwards, shall be removed into any superior court, by hab. corp. or otherwise, unless the defendant shall enter into recognizance for the payment of the debt and costs, in case judgment should pass against him; as in *Sect. 5.*

If judgment be obtained in the inferior court, and the defendant cannot be found, how to proceed.

By sect. 4. it is enacted, that in all cases where final judgment shall be obtained in any action in any inferior court of record, it shall be lawful for any of his majesty's courts of record at *Westminster*, on affidavit made and filed therein, of such judgment being obtained, and of diligent search and inquiry having been made after the defendant, or his effects, and of execution having issued against the person, or effects, and they are not to be found within the jurisdiction of such inferior courts, which affidavit may be made before a judge or commissioner, to cause the record of the said judgment to be removed into such superior court, to issue writs of execution thereupon to the sheriff of any county, &c. against the person or effects of the defendant, in the same manner as upon judgments obtained in the said court at *Westminster*; and the sheriff is authorized to detain the defendant until 20s. be paid to him, or levy the same out of the effects, according to the nature of the execution, for the extraordinary costs of the plaintiff in the inferior court, subsequent to the said judgment, and of the execution in the superior court, over and above the money for which such execution shall be issued.

Upon what conditions execution shall

That no execution shall be staid upon any writ of error to be sued for the reversing of judgment given in any infe-

rior court of record, where the damages are under 10l. unless such person, with two sufficient sureties, shall first, before such stay made, be bound unto the party for whom any such judgment is given by recognizance, to be acknowledged in the same court, in double the sum adjudged, to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of error be nonprossed) the debt, damages, and costs adjudged, and all costs and damages to be awarded for the same delay of execution. *Sect. 5.*

George the third, &c. To the sheriffs of *London*, greeting: we command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before our right trusty and well-beloved *Edward Lord Ellenborough*, our chief justice, assigned to hold pleas in court before us, at his chambers situate in *Serjeant's-Inn, Chancery-lane*, immediately after the receipt of this writ, to do and receive all and singular those things, which our said chief justice shall then and there consider of him in this behalf; and have there then this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign. *Law and Markham.*

London, ha. corp. for *C. D.* to do and receive, returnable immediately. *T. K. attorney.*

To be taken to Messrs. *Provost and Chambre*, pay signing, in term 6s. 8d. in vacation 7s. 8d. seal 7d. take same to the office where the action is entered, and if but one cause, and above 10l. pay 4s. 10d. for the allowance; fee to the judge 2s. 4d. mittatis 2s. 4d.

If it be brought to remove a cause out of the inferior court under 10l. then bail must be put in below, and two days notice exclusive given for their coming into that court, and becoming bail for the defendant, in order that the plaintiff's attorney may have an opportunity of inquiring into the sufficiency, and upon their entering into a recognizance, before the judge below, for the payment of the debt and costs, then the judge will order the allowance of the writ. *Vide stat. 19 Geo. 3. c. 70. s. 5.*

But if the debt be above 10l. then if the defendant is not in custody, he has already given bail in the action, which is bail to render; therefore the cause is of course removed, by the *habeas corpus* being allowed.

be staid upon any writ of error, &c. for reversing judgment given in an inferior court, where the damages are under 10l.

Habeas corpus to remove the cause from the sheriff's court of *London*.

N. B. If from the mayor's court, *London*, then direct it to the mayor, aldermen, and sheriffs of the city of *London*.

To bear teste in term.

Præcipe.

How to proceed.

How to proceed before allowance is made of hab. corp. and action be under 10l.

If above 10l.

How Plaintiff is to proceed after Cause removed.

After the bail is complete in the court below, the first step the plaintiff's attorney takes, is to apply to one of the judge's clerks for a rule for bail, which is returnable in term, within four days next after notice, in vacation six days next after notice, pay for same in term 3s. 6d. in vacation 4s. 6d. Serve defendant's attorney with a copy thereof; and if he does not put in bail within the four or six days next after service, nor take out a summons for time to put in bail, pay 1s. order 2s. (which he may do), then the plaintiff may issue out a writ of *procedendo*. N. on R. H. 10 W.

How to put in Bail.

To apply to the sheriff for return to the *habeas corpus*.

No bail to be put in upon a *habeas corpus* before the writ be returned.

If the defendant puts in bail, he must first obtain the return to the *habeas corpus*.

It is ordered, that no bail shall be put in upon any writ of *habeas corpus* before the writ be returned, and that such bail shall not be taken by any justice of this court, unless that writ, with the return thereof, shall be offered before the said justice, to be filed at the time of putting in thereof. R. H. 10 W. 3.

When you have obtained the *habeas corpus* and return, annex a bail-piece thereto, and fill it up thus: pay s term 4s. in vacation 4s. (a)

Bail-piece on *habeas corpus*, 2s. 6d. stamp.

Trinity Term, in the 57th year of the reign of king Geo. III.

Law and Markham.

London, } A. B. is delivered on bail upon
to wit. } *habeas corpus*.

To John Doe, of London, gentleman,
and
Richard Roe, of the same place,
gentleman.

Oath for 20l.

R. C. Attorney.

At the suit of the plaintiff,
in the plaint.

(a) The bail may be put in the country before a commissioner, or before a judge of assize in his circuit. R. T. 8 W. 3. Reg. 3. s. 1.

Take the bail, habeas corpus and return to a judge's chambers, who will enter them in the following recognizance, if above 10l. on the receipt of a memorandum or warrant to defend on a 5s. stamp. How to proceed.

" You do jointly and severally undertake, that if the defendant be condemned at the suit of the plaintiff (or plaintiff's) in the plaints that he shall satisfy the costs and condemnation, or render himself to the custody of the marshal of the Marshalsea of the court of King's Bench, or you will do it for him, if under 10l." Vide stat. 19 Geo. 3. c. 70. Pay in term 4s. in vacation, 5s. Recognizance of bail on habeas corpus.

Notice is to be given forthwith to the plaintiff's attorney, of the names and additions of the bail, the time when, and the judge before whom the same is put in. As to giving notice of bail.
R. M. 1654, sect. 8.

A. B. plaintiff,
and
C. D. defendant.

In the King's Bench.

Take notice that special bail was this day put in upon the habeas corpus issued in this cause, before the honorable Mr. Justice ——— at his chambers in *Serjeant's-Inn, Chancery-lane, London*, and the names are *John Doe*, of London, gentleman, and *Richard Roe*, of the same place, gentleman. Dated, &c. Yours, &c. Notice of bail being put in,

R. C. defendant's attorney.

To Mr. R. T. attorney for the plaintiff.

Of Plaintiff's further Proceeding.

If the plaintiff's attorney does not like the bail, he may, instead of entering the exception (as in common cases), apply to the same judge for a rule for better bail, pay 3s. 6d. in term, vacation 4s. 6d. which is returnable within four days next after service, whether in term or vacation. N. on R. M. 16 Car. 2. a copy of which is to be served on the attorney for the defendant: if the bail do not justify within the four days (provided there are four days in the term left,) then a procedendo may be issued; but if there be not four days in term, then upon the defendant's giving notice to justify the first day of the next term, before the rule expires, and the bail justifying on that day, no procedendo can issue. When plaintiff may apply for a rule for better bail.

It is ordered that, every defendant, not being an executor or administrator, who shall sue out any writ of habeas corpus to remove any suit out of any inferior court, That every defendant not being executor, &c. upon

a habeas corpus shall put in special bail in all actions whatsoever (actions to remove for scandalous words, and small assaults only excepted), inferior causes, unless one of the justices of this court shall otherwise to put in bail. order. R. H. 2 Jac. 2.

Of Exception to Bail and justifying.

Within what time to except to the bail.

If the plaintiff does not except against the bail, by taking out such rule within twenty-eight days after the putting in thereof, then the bail-piece shall be filed by the defendant's attorney, within four days next after the end of the twenty-eight days, under the penalty of 5s. to the box, R. M. 16 Car. 2.; and for the second offence to be struck off the roll.

Notice of justification.

Take notice that the bail already put in for the defendant in this cause, upon the writ of *habeas corpus*, and of whom you have had notice, will, on next, justify themselves in open court, *Westminster-hall*, in the county of *Middlesex*, as good bail for the said defendant. Dated &c. Yours, &c. R. C. defendant's attorney.
To Mr. R. T. attorney for the plaintiff.

When to be given.

This notice must be given as in other cases of justification, and defendant may add to the bail already put in new bail, and justify as in other cases; make affidavit of the service thereof, and give brief to counsel to move to justify, fee 10s. 6d. court fees 9s. rule for allowance 7s. serve copy thereof on plaintiff's attorney.

If rule expire in vacation, render first day of next term *sedente curia*, good.

If the rule expire in vacation, a render on the first day of the ensuing term *sedente curia* is good; though notice were not given till afterwards on the same day, and after a writ of *procedendo* had issued to an inferior court, where the cause originated. 5 East, 533. *Wiggins v. Stephen*.

Bail are liable to all the actions mentioned in the return.

The bail upon *habeas corpus* are liable to all the actions mentioned in the return of it, wherein the plaintiff or plaintiffs shall declare within two terms. N. on R. 12 2 Jac. 2. (a)

If plaintiff declare different from the cause returned below.

On removal after declaration, special bail are liable though the plaintiff declare in a different kind of action in the court above, so as it be for the same cause. 1 Will. 277. *Gum v. Mackenry*.

If more causes than one, bail must be put in for the whole.

If there be more causes than one returned on the *habeas corpus*, bail in that case must be put in for the whole. *Salk*. 352, and there must be separate bail-pieces annexed to the *habeas corpus* and warrants.

Of Declaration, Venue, and Plea.

After defendant has justified his bail, the plaintiff may declare against the defendant (or he may declare *de bene esse*, as soon as bail is put in above), and the declaration is against the defendant as in custody of the marshal; and all the proceedings are *de novo*, for the record is not removed on a *habeas corpus*, as it is on a *certiorari*. *Salk.* 352. But such declaration must be delivered within two terms, 1 *Str.* 631.; or defendant may refuse it. The defendant cannot in this case sign a *nonpros* for not declaring, as the cause is removed against plaintiff's inclination. *Davis v. James*, 1 *Term Rep.* 372. N. on R. M. 16 Car. 2.

If a cause be removed by *habeas corpus*, out of the courts of *Canterbury, Southampton, Hull, Litchfield, or Pool*, which are counties where the judges of *nisi prius* seldom come, if the action be transitory, it must be laid in the county of *Kent, Southampton, York, Stafford, or Dorset*; where the town and county lieth, and that in all causes of removal, be it by *habeas corpus, privilege, or certiorari*, special bail ought to be given. R. M. 1654, sect. 9.

If defendant lives within twenty miles of *London*, he is to plead in four days; if above, eight days; and the defendant has no imparlance allowed him upon a *habeas corpus*, although declaration be not delivered the same term the *habeas corpus* is brought. (a) 1 *Wils.* 164.

Within what time to plead. The defendant is not entitled to an imparlance.

If a cause be removed by *hab. corp.* out of an inferior court, plaintiff is not bound to declare in the court above, if he has taken no other steps than compelling the defendant to put in and justify bail there. *Clarke v. Dixon*, 3 *Maule and Selw.* 93.

The rest of the proceedings are as in common cases.

(a) The rule (as to imparlance) does not extend to cases where the defendant removes the cause from an inferior court. 6 *Term Rep.* 752. *Smith v. James*, 2 *Bos. and P.* 137.

To what this rule does not extend.

If no Bail put in or justified, how to proceed.

If the defendant does not put in or justify his bail in due time, then issue the following writ of *procedendo*.

Procedendo.

George the third, &c. To the sheriffs of *London*, greeting: Although we lately by our writ commanded you, that you should have the body of *C. D.* detained in our prison under your custody, as it was said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* might be called in the same, before our right trusty and well-beloved *Edward Lord Ellenborough*, our chief justice, assigned to hold pleas in our court before us, at his chambers in *Serjeants-Inn, Chancery-lane, London*, immediately after the receipt of that writ, to do and receive all and singular those things which our said chief justice should then and there consider of him in that behalf; yet we being now moved with certain causes in our court before us, command you, and every of you, that in all complaints and suits against the said *C. D.* at the suit of *A. B.* in our court before you, levied or affirmed, or before you, or any of you, now depending undetermined, you proceed with what speed you can, in such manner, according to the law and custom of our kingdom of *England*, as you shall see proper, our said writ to you first thereupon before directed to the contrary in anywise notwithstanding. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign. *Law and Marston.*

Præcipe.

London. Procedendo for *A. B.* against *C. D.*—*I. K.* attorney: pay signing 5s. 8d. with Messrs. *Provost and Chambre*, seal 7d. allowing 6s. 10d. attorney's fee, 3s. 4d. in the court below.

If after *procedendo* to carry back a cause to the inferior court, the plaintiff recover and sue bail on *sci. fa.* and they bring *ha. corp.* to remove the cause, court will order a *procedendo* in the suit against the bail.

In *June 1794*, plaintiff commenced an action in the *Marshalsea Court* against one *Daly*, and held him to bail. In *July*, a *ha. corp.* was brought to remove the cause here; but for want of justifying bail in *Michaelmas term* a *procedendo* issued.—The present defendants were bail below. In *Hilary term*, cause was tried below; verdict for plaintiff, and costs taxed. Afterwards a *sci. fa.* issued against the above defendants, who appeared, and declaration was delivered; they demurred, and before argument, brought a *ha. corp.* to remove the cause here. The steward of the *Palace Court* returned the *sci. fa.* att. of the plaintiff. Motion why *procedendo* should not be granted.—Court said, that this proceeding by *sci. fa.*

was merely an attendant on the original cause ; and that is that had been already sent back to the Palace Court, his ought also to follow it, for that the proceeding against the bail should be carried on in the same court with the principal action. Rule abs. *Dickson v. Heslop and Gilpin*, bail of *Daly*, 6 Term Rep. 365. The rule also was for costs of the application, which was granted.

A cause was removed from an inferior court by *ha. corp.* to which a return was made, stating, a custom under which the defendant was sued, and arrested ; the defendant, who removed the cause, not having proceeded in here, the court awarded a *procedendo*, though error was suggested on the face of the proceedings below ; this court saying they would leave the defendant to his writ of error. *Horton v. Beckman*, 6 Term Rep. 760.

It is laid down, if a writ be against a *feme sole* in the inferior court, who afterwards marries, and brings a *habeas corpus* to remove the cause, the court will order a *procedendo* ; for though an *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. *Salk.* 8. Vide *Barnes*, 355. where the court set a plea of coverture aside. *Haddorpe v. Howard*,

A *procedendo* was awarded, though error suggested.

As to a *feme sole*.

DIRECTIONS TO THE INFERIOR COURTS.

As a habeas corpus, and procedendo, must be directed properly to the inferior courts, such of them as I have directed, are as follow :

To the marshal of our prison of the Marshalsea.

To the warden of our prison of the Fleet.

To the mayor, aldermen, and sheriffs of London.

To the sheriffs of the city of London.

To the judges of our palace court of Westminster, and each of them, greeting.

If it is in the sheriff's court in any county, direct it to the sheriff, as Middlesex, Berks, Oxford, &c.

To the steward of our court of record, within the manors of Stepney and Hackney, in the county of Middlesex, hamlets and liberties of the same, and also to the notary of the same court.

To the mayor, bailiffs, and burgesses of the borough of Abingdon in the county of Berks, and to every of them.

To the marshal of the Marshalsea.

To the Fleet.

Mayor's court London.

Sheriff's court of London.

Palace court.

If in sheriff's court in any county.

Stepney.

Abingdon.

- Bath.** *To the mayor, recorder, and aldermen, justices of our city of Bath, in the county of Somerset, and to every of them.*
- Bedford.** *To the mayor, aldermen, burgesses, and recorder of the town of Bedford, in the county of Bedford.*
- Beverley.** *To the mayor, aldermen, and burgesses of the town of Beverley, in the county of York.*
- Bristol.** *To the mayor, aldermen, and sheriffs of the city of Bristol, and to the mayor and constables of the staple of the same city, and also to the bailiffs of the mayor and commonalty of the same city of Bristol, of their court of Tolsey, and to the bailiffs of the said mayor and commonalty of the same city of their court of piepowder, and to every of them.*
- Buckingham.** *To the bailiff and burgesses of the town of Buckingham, in the county of Buckingham.*
- Bury Saint Edmund.** *To the mayor, recorder, and burgesses of the borough of Bury Saint Edmund, in the county of Suffolk.*
- Caermarthen.** *To the mayor, or recorder, and town clerk of the borough court of Caermarthen,*
- Cambridge.** *To the mayor and bailiffs of the town of Cambridge.*
- Canterbury.** *To the steward of the liberty of by Divine Providence archbishop of Canterbury, in the court of his palace, within the city of Canterbury.*
- Carlisle.** *To the mayor, aldermen, bailiffs, and citizens of our city of Carlisle, in the county of Cumberland.*
- Coventry.** *To the mayor, bailiffs, and commonalty of our city of Coventry.*
- Derby.** *To the mayor and burgesses of our borough of Derby, in the county of Derby.*
- Ely.** *To our chief justice of the bishop of Ely assigned to hold pleas in the Isle of Ely, and to the steward of the same, the bishop within the liberties of the isle aforesaid.*
- Or thus—To our trusty and well beloved our chief justice assigned to hold the sessions of pleas, within the liberty or royal franchise of the honourable and right reverend father in God — by divine permission lord bishop of Ely, within the isle of Ely, in the county of Cambridge, and to Esquire, chief bailiff of the said bishop, within the liberties of the said isle, and to each of them.*

• N. B. *A non-omittas or latitat is directed in this way.*

To the mayor and bailiffs of our city of Exeter, in the Exeter. county of Devon, and to the bailiffs, citizens, and provosts of the same city.

To the mayor, aldermen, and sheriffs of our city of Gloucester. Gloucester.

To the mayor, aldermen and citizens of our city of Hereford. Hereford.

To the mayor and capital burgesses of the borough of Hertford. Hertford, in the county of Hertford, and also to the steward of our court of record there.

To the mayor, aldermen, and burgesses of the borough Huntingdon. of Huntingdon in the county of Huntingdon.

To the mayor and sheriffs of our town and county of Kingston upon Hull, in the county of York.

To the bailiffs and steward of our court of our town of Kingston upon Thames; and, in the absence of the said steward, to the bailiffs and recorder of the same town, or any two of them.

To the mayor, sheriffs, and citizens of our city of Lincoln. Lincoln.

To the bailiffs, burgesses, and citizens of our city of Litchfield. Litchfield.

To the mayor and bailiffs of our borough of Liverpool, Liverpool. in the county of Lancaster.

To the recorder, bailiffs, and capital burgesses of our borough of Ludlow, in the county of Salop.

To the mayor and recorder of our town or borough of King's Lynn. King's Lynn, in the county of Norfolk.

To the steward of the dean and chapter of the collegiate church of Saint Peter, Westminster, of the court of their liberty, or precincts of Saint Martin's the Great, in London, and to the constables there.

To the mayor and bailiffs of our town of Monmouth. Monmouth.

To the mayor, aldermen, and burgesses of our borough Newbury. of Newbury, in the county of Berks.

To the mayor and bailiffs of our town and borough of Northampton. Northampton, in the county of Northampton.

To the mayor, aldermen, and sheriffs of our county of Norwich. the city of Norwich.

To the mayor and burgesses of our town of Nottingham. Nottingham. ham.

- Oxford. *To the mayor and bailiffs of our city of Oxford, in the county of Oxford.*
- Portsmouth. *To the mayor, aldermen, and burgesses of our borough of Portsmouth, in the county of Southampton.*
- Southampton. *To the mayor and bailiffs of our town of Southampton.*
- Taunton. *To the bailiff of the reverend father in Christ by Divine Providence lord bishop of Winchester, of his liberty of Taunton and Taunton Dean, in the county of Somerset.*
- Thetford. *To the mayor and recorder of our borough of Thetford, in the county of Norfolk.*
- Wells. *Wells, borough or city. To the steward or bailiff of our court of our pleas, granted to the reverend father in Christ, lord bishop of Bath and Wells, held at the Guildhall within the city and borough of Wells in the county of Somerset.*
- Woodstock. *To the mayor of the town of New Woodstock, in the county of Oxford.*
- Worcester. *To the mayor, recorder, and aldermen of our city of Worcester, and to every, &c.*
- York. *To the mayor, aldermen, and sheriffs of our city of York.*
- If the writ be improperly directed. *If the writ be improperly directed to inferior courts, and they make a return, no objection can be made by third persons. Daniel v. Phillips, 4 Term Rep. 499.*
- Excise officers. *The court of K. B. will not quash a writ because the damages laid in the record below, which was an action for an assault against excise officers, were under 40s.: they said the officer could not have an impartial trial there. Ibid.*

Ha. Corp. ad satisfaciendum.

Ha. corp. ad satisfaciendum.

This writ is made use of by a plaintiff in this court, where his prisoner has removed himself after declaration to the Fleet prison, and obtained final judgment in order to bring him here, to charge him in execution upon a judgment obtained; and it is called an habeas corpus ad satisfaciendum, to satisfy or make satisfaction to the plaintiff for the debt and damages by him recovered; which being obeyed, the court commit him again to the custody of the marshal, there to remain until he make satisfaction, and is made returnable on a day certain, as the

prisoner cannot be committed in execution, but by the court, whilst they are sitting. Also it may be sued out by a third person, who has obtained judgment in this court against the prisoner, directed to the marshal or other gaoler to bring him into court, in order to charge him in execution at his suit in that action; and although in this case it be left in vacation with the marshal or other gaoler, he cannot discharge such prisoner, but must bring him into court on the day of the return.

Ha. Corp. ad satisfaciendum in Assumpsit.

George, &c. To the warden of our prison of the Fleet, greeting: We command you, that you have before us at *Westminster*, on next after the morrow of All Souls, the body of C. D. under safe and secure conduct, detained in our prison under your custody, as we are informed together with the day and cause of his being taken and detained, by whatsoever name the said C. D. is hereknown, to satisfy A. B. 25l. which the said A. B. lately in our court before us at *Westminster*, recovered against the said C. for his damages which he sustained, as well by reason of he not performing certain promises and undertakings lately made by the said C. to the said A. at *Westminster*, in the county of *Middlesex*, (a) as for his costs and charges by him laid out, about his suit, in that behalf, whereof the said C. is convicted, as appears to us of record, and further to do and receive what our said court before us, shall then and there consider of him in this behalf: and have there then this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign.

Ha. Corp. ad satisfaciendum in Debt.

George, &c. To the warden of our prison of the Fleet, greeting: We command you, that you have before us at *Westminster*, on next after the morrow of All Souls, the body of C. D. under safe and secure conduct, detained in our prison under your custody, as we are informed, together with the day and cause of his being taken and detained, to satisfy A. B. as well a certain debt of 25l. which the said A. B. lately in our court before us at *Westminster*, recovered against the said C. D. as also 10l. for his damages, which he had sustained by reason of the detaining the said debt, as for his costs

5s. stamp.
Put the term and No. roll on the writ, as the master marks it on the roll.
1 Sid. 100.
R. M. 1654.
s. 7. R.
2 Geo. 1.

(a) The venue in the declaration.

Law and Markham.

To be signed by Messrs. *Provost* and *Chambre*, and a *præcipe* is made for that purpose; pay them 6s. 8d., seal 7d.; then it is to be lodged with the warden of the Fleet: on the day of the return, he is brought up, apply to one of the judge's clerks, who will make out the commitment; pay the warden his fee for return and bringing up; tip-staff 10s. 6d. judge's clerk 4s. master 2s. deputy-marshal 2s. clerk of the papers 1s. ushers 6d. the judge's clerk takes the habeas corpus into court with the defendant, and the master commits him.

Præcipe.

London. Ha. Corp. ad satisfaciendum for A. B. against C. D. for 25l. damages, (for 25l. debt and 10l. damages and costs,) returnable, &c.

J. K. attorney.

N. B. The master marks the commitment on the duplicate of the writ to be prepared ready for him, which is delivered to the tipstaff, who carries the prisoner over to the King's Bench prison. Pay master 2s. (a)

PAUPERS.

Definition.

A PAUPER is a person said by the law to be so poor and indigent in his circumstances, that he cannot expend the usual charges to recover his right, either in law or equity.

Every poor person shall have writs for no fee, counsel and attorney.

By the stat. 11 H. 7. c. 12. it is enacted, that every poor person who shall have cause of action, &c. shall have original writs, &c. nothing taking for the same, counsel, attorneys, and all other officers requisite and necessary for the speed of the said suits to be had and made, who shall do their duties without any reward. No stamps are to be used, 5 W. & M. c. 21. in the proceedings.

Sum to be under 5l.

The courts have fixed the sum to be under five pounds (except wearing apparel, and his right to the matter in question.) *Lill. Pract. Reg.* 633.

How to sue.
3 Wils. 24.

Therefore, if the plaintiff is so poor as above stated, he must petition one of the judges of this court, to be ad-

(a) Final judgment must be entered on the roll, and roll docketted previous to the charging the defendant in execution, and filed with the clerk of the treasury.

mitted to sue in *forma pauperis*, and if he has begun the suit, and is not able to carry on the same, yet he may petition to be admitted; engross it on a 2s. 6d. stamp paper, annex also the affidavit thereto on 2s. 6d. stamp paper, then take same to the judge's chambers, and after oath is made thereof, the clerk will make out an order thereon, pay him 2s. 6d. The form of petition and affidavit are as follow; no rule is drawn up in this case:

In the King's Bench.

A. B. plaintiff,
and **Petition.**
C. D. defendant.

*To the Right Honourable Edward Lord Ellenborough,
Lord Chief Justice of his Majesty's Court of King's
Bench.*

The humble Petition of A. B.

Sheweth,

That the said defendant is and stands justly indebted unto your petitioner in the sum of 10l. for the work and labour of your petitioner, done for the said defendant, at his request, and your petitioner hath commenced an action against him for the same.

That your petitioner finds himself unable to carry on any action
the said cause, on account of his extreme poverty, against him,
appears by the affidavit hereto annexed: being unable,"

" Your petitioner, therefore, most

"humbly prays your lordship that

" he may be admitted *in forma pau-*

unably conceive, that the petitioner hath good use of action against the above-named C. D. and hereby consent to be his S. M.

“ peris to prosecute his said action,
 “ and that S. M. esq. may be as-
 “ signed to him as his counsel, and
 “ J. K. his attorney to prosecute
 “ his said suit.

"J. K. his attorney to prosecute

"his said suit.

" And your petitioner shall ever

“ pray,” &c.

the King's Bench.

A. B. agt. C. D.

A. B. of, &c. yeoman, maketh oath and saith, that he Affidavit.
not worth five pounds in all the world (save and ex-
cept his wearing apparel and the matter in question in
a cause.)

To pay no fees.

The pauper upon the order being made, may sue out his writ without stamps, pays nothing through all the cause for fees to any of the officers; if defendant pleads a special plea, shew petition and order to the clerk of the papers, and he will make up the paper book for nothing; no stamps are used for the record, venire, or distringas, nor for setting down the cause, or return of distringas.

Unless he recovers 5l. or more.

But if he recover a verdict, the officers of the court claim the fees of court, and take for the passing the record; but by what authority, I never yet could learn.

Declaration.

The declaration is in the common form; to which you annex a copy of the judge's order, of his being admitted.

No fee to be paid to counsel or attorney.

If the party give any fee or reward to his counsel, or attorney, or make any contract or agreement with them, he shall be dispaupered, and not be admitted again in that suit.

Not liable to pay costs.

He is not liable to pay costs, but be in the discretion of the court, whether he shall be punished or not. Stat. 23 H. 8. 2 *Salk.* 506. He is not liable to pay the costs for judgment as in the case of a nonsuit. 3 *Wils.* 24.; nor to pay the costs before he brings a new action, if it does appear that he has not been vexatious. *Str.* 878. Nor to pay the costs for not going on to trial. *Ibid.* 420. *Noaks v. Watts. Fortesc.* 319.

When he may be dispaupered.

If he has been vexatious, as giving six notices of trial, and not proceeding, the court will dispauper him, but not make him pay costs. 2 *Str.* 983.

After nonsuit, and a new action brought before payment of the costs.

The plaintiff (not suing *in forma pauperis*) being nonsuited in a former action against the defendant, brought a second action for the same cause, and sued *in forma pauperis*, being a prisoner in the K. B. The costs of the former action amounted to 32l. which the defendant swore he could not levy, the plaintiff not having any goods. Rule why the proceedings in the second action should not be staid until the costs of the former were paid, made absolute. *Weston v. Withers, 2 Term Rep.* 511.

Can only sue in cause he is admitted.

A person admitted *in forma pauperis*, can only sue in that cause for which he is admitted, so that if any other cause arises, he must be admitted again *de novo, et sic toties quoties.* *Lil. Reg.* 633.

Cannot be admitted to defend.

Although the stat. of 11 H. 7. admits poor persons to prosecute, yet it has not provided for poor defendants to

defend; nor does the stat. of 23 H. 8. exempt them from paying costs; therefore they cannot petition to defend in *forma pauperis*. *Barnes*, 328.

CONSOLIDATING OF ACTIONS.

(a) If there be two or more actions brought upon the same policy of assurance against the underwriters, or two or more ejectments on the demise of the same lessor of the plaintiff for the same premises, and they proceed separately, the defendants may apply to the court by way of motion to consolidate such actions; if in term time, it is a rule to shew cause, if in vacation, by way of summons, before a judge; and upon their undertaking to be bound, and concluded, in all the actions, by the fate of the verdict in the action brought against the first defendant, and to bring no writ of error, the court will stay all the proceedings in the last actions until further order; but all the rules must be paid for separately, as also the summonses and orders; and if the verdict turns in favor of plaintiff, to the satisfaction of the judge who tried the cause, the plaintiff may proceed to tax his costs on that verdict, and get the defendant's attorney to attend the master, who will tax the costs in the other actions, which if complied with (as is usual,) and not paid with the debt, move the court, upon an affidavit of the facts, "*for leave to enter up the judgment, and take out execution thereon, and that the master may tax the costs in all the causes, and for the costs of the application*;" one stamp for the affidavit is sufficient, which the court will order; after the costs are taxed, they are to be paid within a limited time; if not, sign the judgments upon a 10s. stamp, and

How to consolidate actions.

2 Barnard, K. B. 103. contra.

(a) It seems that Lord Mansfield introduced the consolidating rule, to avoid the expense and delay arising from the trial of a multiplicity of actions upon the same question. And if the plaintiff will not consent, court have the power of granting imparlances in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action. *Parke's Insur. Introd.* And he adds, if the plaintiff consents to the rule, court will make defendant submit to admit the policy, produce and give copies of books and papers, and undertake not to file a bill in equity, or bring a writ of error. *Ibid.*

take out execution thereon; you pay for separate rules, and counsel's fees are not fixed.

Verdict in this case must be such a one as court thinks ought to stand.

The verdict in this case must be such a one as the court thinks ought to stand, as a final determination of the matter. *Hodgson v. Richardson*, 3 Burr. 1477. Therefore if a new trial be granted in one action, the court will make a rule for the other defendants, to pay the money pursuant to their undertaking. *Ibid.* See title *Payment of Money into Court*, the case of *Burstall v. Horner*. 7 Term Rep. 372.

If two actions be brought which might have been joined.

If two actions are brought by the same plaintiff, for causes which may be joined, and the defendant be holden to bail in both, the court will compel the plaintiff to consolidate them, and pay the costs. *Cecil v. Burgess*, 2 Term Rep. 639. See 2 Str. 1149. 1178. contra.

Thirty-seven ejectments on same demise consolidated.

Rule why the proceedings in all the causes, (37 in number in ejectment for houses in *Sackville-street*) should not be staid, and abide the event of a special verdict, in *Doe ex demise Pullenoy v. Cavan*—Lord *Kenyon* said, it was a scandalous proceeding, they all depended precisely on the same title, and ought all to be tried by the same record. Rule abs. *Doe ex demise Pullenoy at al. v. Freeman, Sellon*, 229.

But where three actions were successively brought on three notes, due at different times, refused.

But where three actions were successively brought by the same plaintiff, against the same defendant, upon three notes of hand, which became due at different times, the court refused to consolidate them. *Messenden v. O'Hara*, M. 25 Geo. 3. *Tidd*, 367. And the court will not consolidate actions against different defendants in trespass, though the affidavit be that the trespass, if any, was committed by all jointly: the court said, they never went so far as the case of different defendants, but only where the declarations are between the same parties. 1 Str. 420. *Bayley v. Raby et al.* Cas. Temp. Hardw. 137. (a)

When rule may be applied for.

This rule may be applied for on the same day the plea is delivered or filed; for in that rule will be contained, a stay of the proceedings, which will prevent all the issues being made up and delivered. But you must plead before the application.

(a) Also see 1 *Smith Rep.* 423. where three actions were brought for bribery, court refused the rule.

In an action on policy of insurance against several, where the parties had not entered into this rule, the attorney for plaintiff made out a full brief in one cause, but only a short statement in the rest, and the master on taxation, having allowed for full briefs in all the causes, the court made a rule for him to review the taxation. *Martineau v. Barnes*, *Hil. 23 Geo. 3. Tidd*, 534.

As to the briefs in actions against several on policy.

ABATEMENT BY DEATH, &c.

THE general rule to be observed in this case is, that where the death of any party happens, and yet the plea is in the same condition as if such party were living, there such death makes no alteration or abatement of the writ. 10 *Mod.* 251. *Gil. C. P.* 242. Vide title REVIVING JUDGMENTS, and stat. 8 & 9 *W. 3. c. 11. s. 7.* respecting the death of one of the plaintiffs or defendants.

When no alteration made by death.

By the stat. 17 *Car. 2. c. 8.* it is enacted, that the death of either party between verdict and judgment shall not be alleged for error, so as judgment be entered within two terms after such verdict.

If either party die between verdict and judgment.

(b) If either party die *before* the assizes, it is out of the statute; but if *after* the assizes, though before trial, it is no error; for the assizes is but one day in law. *Salk.* 8. *pl. 21.* 2 *Lord Raym.* 1415. 7 *Term Rep.* 32.

If party die before assizes.

If after verdict and before the day in bank, the plaintiff dies, and the defendant signs judgment the second term after the verdict, this is within the statute, and the same as if he had entered judgment on the roll. *Sid.* 385. But a *sci. fa.* must issue before execution. 1 *Wils.* 302. *Earl v. Brown.*

If plaintiff dies after verdict, and before day in bank.

In ejectment, defendant died between the first day of the assizes and verdict: the court held the judgment well entered. *Robertson v. Moor*, 12 *Mod.* 241. 1 *Sid.* 131.

Ejectment.

An ejectment, against baron and feme, after verdict for the plaintiff, baron dies between the day of *nisi prius* and the day in bank; adjudged that the writ shall stand good against the feme, because it is in the nature of a trespass, and the feme is charged for her own act; and

Ejectment against baron and feme, baron dies between the day of *nisi prius* and day in bank, it is good against the feme.

(b) All the sittings are considered in law as only one day, so that of course all verdicts given refer to the first day. *James v. Minicom*, 7 *Term Rep.* 32.

the action survives against her; so if the wife had died, the baron should have judgment entered against him. *Cro. Jac.* 356. *Cro. Car.* 509. *Roll. Rep.* 14 *Moore*, 469.

If feme takes husband after verdict, a *sci. fa.* must be sued.

If a feme sole plaintiff after verdict, and before the day in bank, takes husband, she shall have judgment. *Cro. Car.* 232. but a *sci. fa.* must be sued out before execution.

If pending an argument, plaintiff dies, the suit does not abate.

If pending an argument on a special verdict, and the court takes time to consider thereon, the plaintiff dies, the judgment will be ordered to be entered up as of the term in which judgment ought to have been signed; 1 *Burr.* 226.; the like may be done if the defendant dies. *Ibid.* 147. 4 *Burr.* 2277. 1 *East*, 409.

A feme sole cannot by marriage abate her writ.

A feme sole cannot abate her own writ by marriage, for this would be taking advantage of her own act 2 *Roll. Rep.* 53.

If she is sued and takes husband, writ does not abate.

If a feme sole is sued, and after takes husband, it is no abatement; for the plaintiff would be in a fine condition if, after they have arrested a woman, she shall be allowed to overthrow the proceedings by a subsequent marriage. *Ld. Raym.* 1525. 2 *Str.* 811. *King & ux v. Jones*.

Marriage after suit in an inferior court.

But if an action be brought in an inferior court against a feme sole, and pending the suit, she marries, and afterwards removes the cause, and the plaintiff declares against her as a feme sole, she may plead coverture at the time of the *habeas corpus*, because the proceedings here are *de novo*, and the court takes no notice of what was precedent to the *habeas corpus*; but it is said, the course in those cases is to move the matter to the court upon the return of the *habeas corpus*, and the court will grant a *procedendo*; for though a *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. 1 *Salk.* 8. *pl.* 10. *Sid.* 40. *Cro. Car.* 104.

If there are two suits pending for the same cause of action, the second suit shall abate.

The law abhors multiplicity of actions: and therefore whenever it appears upon record, that the plaintiff has sued out two writs against the defendant for the same thing, the second writ shall abate; but then it must plainly appear to be for the same thing. *Mod.* 418, 539. 5 *Co.* 61.

In actions against executors or administrators, if the application be made in a reasonable time the court will give the plaintiff leave to enter up judgment as of a preceding term, *nunc pro tunc*. 6 *T. Rep.* 6. But it is discretionary in the court, and it has been refused after a considerable lapse of time. 1 *Str.* 639. see 6 *T. R.* 11.

1 *T. R.* 637. 6 *Mod.* 59. Where it shall not operate to the prejudice of defendant by making plaintiff undertake not to disturb intermediate payments, or impeach judgments obtained in the interval.

SUGGESTION AFTER THE DEATH, &c.

By the stat. 8 & 9 *W. 3. c.* 11. s. 6. it is enacted, that if there be two or more plaintiffs or defendants, and one or more of them should die; if the cause of such action should survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not thereby be abated; but such death being suggested on record, the action shall proceed against such defendant or defendants surviving.

If one plaintiff dies, action may proceed; so if one of two defendants.

In such case if the death happen before declaration, it should be suggested in the declaration; if it happen after plea, and before issue joined, it should be suggested in making up the issue; but otherwise, it need not be suggested till the plea roll is made up.

London (ss) A. B. complains of C. D. being, &c. in a plea of trespass on the case, for that whereas the said C. D. on the 1st day of *November* in the year of our Lord 1812, to wit, at *London*, &c. was indebted to the said A. B. and one C. H. his partner, (which said C. H. the said A. B. suggests to the court here, according to the form of the statute in such case made and provided, since the issuing of the writ of *latitat* against the said C. D. at the suit of them the said A. B. and C. H. to wit, on the 28th day of *November* in the year aforesaid, at *London* aforesaid, in, &c. died, and the said A. B. there survived him, which the said C. D. doth not deny, but admits the same to be true,) in 20l. of lawful money, &c. for divers goods, wares, and merchandizes, by the said A. B. and C. H. in his lifetime before that time sold, &c.

Suggestion on the declaration of the death of one of the plaintiffs, after writ sued out.

Go to the end of the issue; the same day is given to the parties aforesaid at the same place; then say, before which day, to wit, on the day of in the year aforesaid, at *London* aforesaid, in, &c. the said A. B. suggests to the court here, according to the form of the statute in such case made and provided, that the said C. H. there died, and the said A. B. survived him, which the said G. H. doth not deny: and the said G. H. by his attorney came; but the said sheriff did not send the said writ, nor did he do any thing thereon; therefore, as before, it is commanded to the said sheriff, that he cause

Suggestion of the death of one of the plaintiffs after issue joined.

to come before our said lord the king, at *Westminster*, on
 next after twelve, &c. by whom, &c.
 and who neither, &c.

Suggestion of
 the death of
 one of the de-
 fendants after
 verdict.

To the end of the postea. And upon this the said G. D. says, that after the last continuance of the plea aforesaid, to wit, on the day of in the year aforesaid, at, &c. in the county aforesaid, the said C. there died, and this is not denied; therefore let all further proceedings against the said C. cease; whereupon the said G. D. prays judgment against the said J. for the damages, costs, and charges aforesaid, by the jury aforesaid, in form aforesaid assessed, to be adjudged to him, &c. therefore it is considered, &c.

Suggestion of
 the death of
 one of the
 defendants in
 the jurata of
 the record,
 when it ought
 to have been
 upon the nisi
 prius record,
 and before the
 jurata right
 suggested on
 the roll, and
 held good.

Upon a writ of error it appeared, that the death of *Rebecca Savil Far* was suggested in the *jurata* of the record of *nisi prius*, and not in the usual way, and afterwards the death was suggested upon the roll in the usual way. The error assigned was, "That there is no record of *nisi prius*, and that judgment is given for the plaintiff below, whereas it ought to have been given for the defendant;" then a *certiorari* issued, to certify the record of *nisi prius*, which was done, and in *nullo est erratum* pleaded by defendant in error: the objection taken was, that it ought to have been suggested upon the *nisi prius* record, and that is not sufficient in the *jurata*. Lord Mansfield—The suggestion, award, and all the proceedings, shew one of the defendants to be dead; and there is an award for the proceedings to stay as to this defendant, and to go on against the other only: and the jury is awarded as against the living one, the other being dead; both were alive when the issue was joined; a day was given to the parties, one defendant is awarded to come, the other not, and the sheriff doth not return the writ, and a new *venire* is awarded to try the issue against the surviving defendant, and it is properly awarded upon the issue roll, and acknowledged. The *nisi prius* roll is only for the direction of the judge, to try it; and it is not traversable on the roll, the judgment is right enough. 1 Burr. 363. *Farr v. Dean*.

One of the
 plaintiffs died
 before interlocutory judgment, but suit went on to execution in the names of both; after

Jordan, one of the plaintiffs, died in Dec. 1793, but in last *Hilary* term interlocutory and final judgment were signed in the name of both plaintiffs. Motion to set aside the interlocutory judgment and subsequent proceedings, and to discharge the defendant out of custody as to the execution in this cause. Pending this rule, *Newnham*, the plaintiff, obtained a cross-rule to shew

ause why the death of *Jordan* before the interlocutory judgment should not be suggested on the roll, and why the writ of *ca. sa.* should not be amended (a) by striking out *Jordan's* name. Both rules came on together. Lord *Kenyon*—This objection should not have been taken at all; the plaintiff might here have made the suggestion as a matter of course; and he ought now to be permitted to make the amendment. Per Cur. Let the first rule be discharged, and the second made absolute, without costs. *Venningham & Jordan v. Law*, 5 Term Rep. 577.

this, and after motion to set aside the proceedings for the irregularity, court permitted suggestion, and to amend *ca. sa.*

(a) *Laroche v. Wasbrough*.
3 T. R. 737.

As no new person is introduced, there is no occasion for a *sci. fa.* to revive the judgment.

No need of *sci. fa.* to revive.

SUGGESTION FOR COSTS ON THE COURT OF CONSCIENCE ACT.

It appears that the legislature has been obliged to improve its authority to prevent trifling and vexatious actions, by establishing courts of conscience, in various districts, in and about the metropolis, and other cities, as *Bristol*, *Gloucester*, and large towns, for the recovering of trifling debts, not exceeding 40s. So that in case the plaintiff and defendant both resided in those cities and towns, those debts properly cannot be sued for in the courts of *Westminster*, so as to make the defendant liable to the costs of such action; but on the contrary those acts (except where it enacts, that the defendant may lead the statute, by stating that himself and the plaintiff lived within the jurisdiction of such court of requests, as the court of requests at *Westminster*, 23 Geo. 2. c. 17.) give costs to the defendant, which is obtained by a motion in court to enter on the plea rule a suggestion, that the damages recovered in such action, did not amount to 40s. and that the plaintiff and defendant resided in such place, and that the defendant was liable to be summoned to the court of requests there.

The first statute establishing a court of request, is the statute of 3 Jac. 1. c. 15. s. 4. which enacts, that if one citizen of *London* sue another out of the jurisdiction, and does not recover 40s. the plaintiff shall not have any costs, but be compelled to pay the defendant so much ordinary costs, as it had truly cost him, in defence of his suit; which statute is extended by 14 Geo. 2. c. 10. to every other person inhabitant within the said city, and to persons renting or keeping any shop, stall, or stand,

London act; the first statute establishing a court of request.

39 & 40 Geo. 3. c. 104. New London court of requests act.

or seeking a livelihood there. And these statutes are now farther extended by the 39 & 40 Geo. 3. c. 104. (a) to debts not exceeding the sum of 5l. enacting, that so much of the said two first acts, as confine or restrain the cognizance or jurisdiction of the court, to debts not exceeding 40s. should be repealed. And further enact, that three commissioners named, shall determine debts not exceeding 40s. and seven or more determine where the debt shall not exceed 5l. s. 2. due to any persons, whether residing within the city of *London* or elsewhere, or to bodies politic, &c. from any persons residing, or inhabiting, within the said city, or its liberties, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the same, and to cause such debtors, so resident, &c. to be summoned, &c. s. 5. And if any action, or suit, shall be commenced in any other court, than the said court of requests, for any debt not exceeding 5l. and recovered by virtue of the said recited acts, (3 Jac. 1. c. 15. 14 Geo. 2. c. 10.) and of this act, or any of them, in the said court of requests, in every such case the plaintiff in such action or suit, shall not by reason of a verdict for him, or otherwise, have or be entitled to any costs whatsoever: and if the verdict be for the defendant, and the judge before whom the same shall be tried, shall think fit to certify, that such debt ought to have been recovered in the said court of requests, then defendant to have double costs and such remedy for recovering same as any defendant may have for his, her, or their costs in any cases by law. s. 12.

As to costs if no more be recovered than 5l. plaintiff not entitled to costs.

If for defendant, and judge certify debt ought to have been sued for in this court, double costs.

Debts to which the act does not extend.

This act not to extend to any debt where any title of freehold, or lease for years, of any lands or tenements, shall come in question, or to any debt by specialty, which shall not be for payment of a sum certain, nor to any other debt, that shall arise by reason of any case concerning testament, or matrimony, or any thing concerning, or properly belonging, to the ecclesiastical court, albeit the same respectively shall not exceed 5l. s. 11.

Attornies.

Attornies are liable to be summoned in this court, and also in the courts of requests for *Westminster*, and the *Tower Hamlets*. See *Dougl.* 382 (n).

(a) This act took effect from 30th Sept. 1800. 2 *East.* 135.

The vicar of St. Giles, *Camberwell*, brought an assumpsit for tithes due to him as vicar from the defendant, who occupied certain tenements within the vicarage, and for which he had two years before paid a composition, at so much an acre; but latterly the number of acres being in dispute, the defendant refused to pay the sum demanded by the vicar, who brought his action, which was tried before *Lord Ellenborough*, when he recovered 1s. 6d. upon a quantum valebant, which with 2l. 14s. 6d. said into court, was his full demand.—It appeared, that plaintiff did not reside within the jurisdiction of the court of requests, in the city of *London*, but that the defendant, though he resided at times at his house in *Peckham Rye*, in Surrey, yet also kept a shop, and carried on trade within the city. Upon an affidavit, that the defendant was a freeman, and inhabitant, within the city of *London*, at the time when the action was brought, and that he was served with the writ within the city; he obtained a rule nisi for leave to enter a suggestion on the roll under the stat. 39 & 40 *Geo. 3. c. 104.* for extending the powers of the court of requests in the city of *London*, that the original cause of action did not exceed 5l. and that the same was recoverable in the said court of requests, it was contended, that this sum was recoverable in the ecclesiastical court. But the court held it was recoverable in the court of requests of *London*, for the right of the tithes did not come in question, and made the rule absolute. *Sandby, Clerk, v. Miller, 5 East, 194.*

If a person's residence be out of the jurisdiction of the court of requests *London*, his occasionally underwriting policy at *Lloyd's Coffee-house*, where he has a seat, does not subject him to the court of conscience. 5 *Esp. N. P. 2. 19.* see 1 *Smith, 334.*; it must be followed as a trade or business. And a market gardener who rented a stand with a shed over it in *Fleet Market*, at an annual rent, which he occupied three times a week on market days till ten in the morning, after which, and on all other days it was occupied by others, was held not to keep a stand within the meaning of the *London* court of requests act. 8 *East, 336. Gray v. Cook.* Also see 1 *N. R. 153.*

In case a verdict be obtained (a) against a person re-

Action for tithes brought by vicar of *Camberwell*, against a person who lived at *Peckham Rye*, and kept a shop in the city, recovery 7s. 6d. held defendant entitled to costs.

A person underwriting at *Lloyd's*, where he has a seat, is not within the act.

So a market gardener having a stall in *Fleet Market*.

How to proceed in case the plaintiff does not re-

(a) See B. and P. 1 vol. 153. *Jefferies v. Watts*, where the rule was to exempt defendant from the payment of costs.

cover more than 5l. for the costs, and defendant should think he has a right to have a suggestion for costs under 39 & 40 Geo. 3.

It is so drawn up.

When the motion is to be made.

Judgment by default, damages 4l. 7s. 6d. defendant moved to pay damages without costs.

Sum reduced by a set-off, or tender.

siding within the city of *London*, at the time the action is brought, and it be for 5l. or less, the defendant may, upon an affidavit, stating that the cause came on to be tried at the sittings after term at *Westminster-hall*, in the county of *Middlesex*, and that the verdict was given for the plaintiff for 4l. 19s. 6d. and that he the defendant, at the time the action was brought against him, lived and resided in *Fetter-lane*, in the city of *London*, and kept a house there, and was served with a copy of a writ of latitat directed to the sheriffs of *London*, at the suit of the said plaintiff, and that he was liable to be summoned to the court of requests for the said city of *London*, for the said debt so recovered, he may apply for a rule to shew cause, why a suggestion should not be entered on the roll pursuant to the statute of 39 & 40 Geo. 3. c. 104. which being granted, draw up the rule, pay for same 6s. 6d. counsel's fee 1l. 1s. serve copy on the plaintiff's attorney, and shew the original, make affidavit of the service, and give brief of affidavit on which you moved for the rule, with the affidavit of service, to counsel to make it absolute, fee 1l. 1s. when made absolute, draw up rule, and get the suggestion drawn, and entered on the roll, which is generally drawn by counsel. Though this rule has been drawn up by the clerk shortly, as I have stated, yet I think it ought to have directed that the plaintiff should bring the *postea* into court, and file the plea roll, so that the defendant might enter a suggestion thereon, that the debt recovered did not amount to more than 5l. For I conceive that the master must have the *postea* indorsed with the suggestion entered thereon, as well as the plea roll, to mark the costs thereon, and there must be a rule for judgment given. The motion must be made before the plaintiff signs his final judgment. See 2 H. *Black. Rep.* 354.

Judgment by default, inquiry executed, and damages assessed, at 4l. 7s. 6d. Rule nisi to enter a suggestion under the *London* court of conscience act, 39 & 40 Geo. 3. and why upon payment of 4l. 7s. 6d. without costs, proceedings should not be staid. Court made the latter part of the rule for staying proceedings on payment of the damages assessed without costs absolute. *Dunster v. Day and Smith*, 8 *East*, 239. *Brampton v. Crabb*. 1 *Str.* 46, is over-ruled. See 2 H. *Bl.* 356.

None of the courts of conscience acts extend to cases, where the sum recovered is reduced under 40s. by means of a set-off. *Pitts v. Carpenter*, 2 *Str.* 1191. 1 *Wils.* 19.

S. C. or tender. *Heaward v. Hopkins*, Dougl. 448. (a) Where a cause is referred to arbitration, and the costs are directed by the rule to abide the event of the suit, the plaintiff is not entitled to costs, if it appear by the award, that the original demand was under 40s. and he might have recovered it in a court of conscience. 3 Term Rep. 139. *Watson v. Gibson*. Reference.

The court in one instance permitted a suggestion to be entered on the roll, in an action brought by an administrator. *Ware adm. v. Wyburd*, Dougl. 247. But in an action brought against an executor, they refused it. *Alway v. Burrows*, executor, ibid. 263. 5 Term Rep. 535. 529. It was not meant to give the court of conscience a jurisdiction over executors. If there is no express exception in the 23 Geo. 2. c. 33. there is one implied, from the nature and reason of the thing. If action by administrator. If against executor.

An attorney is not subject to the jurisdiction of the county court of *Middlesex*. 2 Wils. 42. Dougl. 380. (b) Attorney when not subject to the jurisdiction.

Where a defendant living within the jurisdiction of the court of requests at *Westminster*, is sued in one of the superior courts, for a debt under 40s. he must plead the stat. 23 Geo. 2. c. 17. in bar of the action. For if he omit so to do, the court will not after verdict, either order a suggestion to be entered, nor stay the proceedings, *Taylor v. Blair*, 3 Term Rep. 452. The Tower Hamlets act gives no form of plea, yet may be pleaded, or the facts which bring a case within it, may be given in evidence under the general issue, to nonsuit the plaintiff. If defendant lives at Westminster, must plead the statute. If he omit to plead. Tower Hamlets. 2 H. Black. Rep. 362. In these acts, there is a prohibitory clause, declaring, that no action for any debt under 40s. and recoverable in the court of requests, shall be In these acts a prohibitory clause,

(a) But it is otherwise if reduced by payment in part. 8 East, 28. 347. 4 Burr. 2133. and see 14 East, 344. where a demand of 8l. was reduced below 5l. by plaintiff's taking old lead, and allowing for it, instead of using it, as far as it would go; the plaintiff is not entitled to costs on his verdict, for 3l. 16s. 4d. but the defendant was entitled to a suggestion on the Southwark act. *Porter v. Philpot*. Also see *Bateman v. Smith*. Ibid. 301.

(b) And where a person is sued in a superior court for a debt under 40s. he may move to stay proceedings. 3 Burr. 1592. 2 Black. R. 754. 2 N. R. 84.

brought against any person within the jurisdiction thereof, in any other court whatsoever. In the *London, Southwark*, and *Middlesex* acts, there is no such prohibitory clause.

Attornies plaintiffs.

Attorney residing in Bath, defendant in London, action for business done at Bath, verdict for 4l. 19s. held no suggestion.

Attornies *plaintiffs*, are not within the court of conscience act, 39 & 40 Geo. 3. c. 104. compellable to sue there for a debt of 5l. or under. Therefore where an attorney residing in *Bath*, did business there, and brought his action in this court for 4l. 19s. and obtained a verdict for that sum against defendant, who resided within the city of *London*, the court discharged the rule for a suggestion, saying, the case of attornies plaintiffs having been holden not to be within the act of 23 Geo. 2. c. 28. establishing the *Middlesex* court of conscience, the words of which are equally general with the act in question; the same reason holds for determining that attornies plaintiffs, are not within the latter. *Board v. Parker*, 7 East, 47. *Dougl.* 382. *Hussey v. Jordan*, 3 Smith's R. 52. S. C.

If cause of action arise in *Middlesex*, and defendant live at *Newcastle*, may sue in this court for less than 40s.

Where plaintiff resided in *Oxon*, and defendant in *Wilts*, and cause of action arose in *Oxon*, though under 40s. yet he may sue in this court.

If action be brought against a defendant in any other county (except *London*) and verdict be under 40s.

Where the cause of action arose in *Middlesex*, and the defendant lived at *Newcastle upon Tyne*, and the court of conscience there could not hold plea, unless both plaintiff and defendant resided there, this court held, that though the plaintiff sued here for a debt under 40s. he was entitled to his costs. 8 Term Rep. 235.

Where the plaintiff resided in *Oxfordshire*, and the defendant resided in *Wiltshire*, and the cause of action arose in *Oxfordshire*, yet in that case, the plaintiff would if he brings his action in this court, be entitled to costs, although he do not recover 40s. for if it cannot be brought to the inferior jurisdiction, the plaintiff is not therefore to lose his debt. *Tubb v. Woodward*, 6 Term Rep. 165. 2 H. Black. 29. And where an action is brought in the county court it cannot be sustained, unless the cause of action arise, and defendant reside within that county.

If an action be brought in this court against a defendant, who is an inhabitant and resident in a city (except *London*), town, or county, where there is a court of requests held to recover small debts, and the plaintiff also an inhabitant, and resident there, at the time the action is commenced, and the defendant liable to be summoned to such court of requests for such debt, and the plaintiff recovers a less sum than 40s. the defendant may after the verdict and before judgment signed, apply to this court upon an affidavit, stating, that such action was brought against him by the plaintiff; and that a verdict

was given for him to the amount of 11. 10s. and that at the time of the commencement of such action, he and the plaintiff were both inhabitants and residents in such city, town, or county, and that he the defendant was liable to be summoned to the court of requests there for the said debt, for a rule to shew cause why the plaintiff should not bring the *postea* into court, and file the plea roll, so that the defendant may enter a suggestion thereon, that the debt recovered in the action doth not amount to 40s. and that at the time of the commencement of the action, the plaintiff and defendant were both inhabitants, and resident within of (the place) and that the said defendant was liable to be summoned to the said court of requests there, and why the plaintiff should not pay to the defendant double costs of suit, (if the act gives double costs) pursuant to an act of parliament, made in, &c. and that in the mean time all proceedings be staid: which draw up at the clerk of the rules, serve copy and shew the original rule, make an affidavit of such service, and shewing the original rule, then give brief of affidavit to counsel, to move to make it absolute, fee 11. 1s. if made absolute, draw up rule and serve a copy on plaintiff's attorney; get the suggestion drawn by counsel, enter the same on the *postea*, and the roll, stamp the *postea* with a 10s. stamp, take it to the master, and bespeak the roll of Mr. Edge, and tax the costs, give notice thereof to the plaintiff's attorney of the time of taxing. The master marks the costs on the *postea*, and roll, then sue out execution. The costs of the application are included in such taxation. 2 Str. 1120. *Hickman v. Colley*.

The rule to shew cause.

A rule for judgment should be given.

It may be necessary here to observe, that the affidavit should be penned agreeably to the words mentioned in the act, upon which you are to obtain the rule for such a suggestion.

As to the affidavit.

It was held that an action for use and occupation cannot be maintained in the court of requests, as the title might come in question, if brought by a devisee or a purchaser, *Woolley v. Cloutman, Dougl.* 247. and a suggestion was denied. So on a special action on the case for the breach of an agreement, 5 Term Rep. 529, the court saying, that the acts extend to cases only where a sum certain is due. *Jones v. Greening*.

The court of requests cannot hold plea for rent.

Nor on a special agreement, must be for a sum certain.

The jurisdiction of the courts of request for *Southwark* Southwark. and the east hundred of *Brixton* is extended to 5l. by stat. 46 Geo. 3. c. 87. The city of *Bath* and its environs Bath. to 10l. 45 Geo. 3. c. 67.

Can only be entered where there has been a trial when too late.

A suggestion cannot be entered under stat. 23 Geo. 3. c. 33. in order to entitle the defendant to double costs after judgment by default and writ of inquiry, but only where there has been a trial. *Harris v. Lloyd*, 4 *Maule and Selw.* 171.

It is too late for the defendant in the term after judgment signed, and execution levied, to apply to enter a suggestion on the court of conscience act to deprive the plaintiff of his costs, if he could have applied in the same term. *Hatchorn v. Cook*, 2 *Maule and Selw.* 348.

If defendant lodge within jurisdiction of Southwark.

If the defendant lodge within the jurisdiction of the Southwark court of conscience act, 22 Geo. 3. c. 47. having consance of causes to the amount of 5l. by stat. 46 Geo. 3. c. 87. though he carry on his business, and the goods were delivered out of the jurisdiction, if the plaintiff had no knowledge of his lodging within it till after the process was sued out, yet he is within the stat. *Spencer v. Holloway*, 15 *East*, 647.

DISCONTINUANCE OF THE ACTION.

See N. on R. M. 10 Geo. 2.

It may so happen, that the plaintiff may find that his action is not maintainable, or that he may wish not to proceed further in the suit: in either of these cases, it is usual for him to take out a side-bar rule to discontinue his action, upon payment of costs; and this rule may be obtained of course, either before or after trial or inquiry. 1 *Salk.* 178. and leave has been given to discontinue after argument, and before judgment on demurrer. 3 *Lev.* 440. 1 *Str.* 76, 116.

The ground of it is, that the opportunity of prosecution is lost, and not recoverable but by beginning a new suit.

When plaintiff cannot discontinue without motion.

It has been ruled that the plaintiff may discontinue upon motion after a special verdict, which is not complete and final, but never after a general verdict, 1 *Salk.* 178.: or after inquiry executed and returned. *Carth.* 86.: or after peremptory rule for judgment on demurrer. 1 *Salk.* 179. 2 *Saund.* 73. (1).

After verdict.

After issue and a verdict, cannot discontinue without consent of defendant; for if plaintiff will not enter up judgment, defendant may. *Salk.* 178.

How to proceed.

Go to the clerk of the rules for a rule to discontinue, informing him how far you have proceeded in the cause,

pay him 6s. 6d. then apply to the master for an appointment to tax the costs, make a copy of rule and serve it on the defendant's attorney, attend the appointment, and in case the defendant's attorney does not attend, the master will tax the costs without him, which must be paid forthwith, the rule is conditional.

The service of this rule, without proceeding to tax the costs, and payment, is not a discontinuance of the action. *6 Term Rep. 765. Whitmore v. Williams.* But the plaintiff is not liable to an attachment for the nonpayment of such costs. *Stokes v. Woodeson, 7 Term Rep. 6.*

Must pay costs.
Not liable to attachment.

A discontinuance of a former action is not complete so as to entitle the plaintiff to arrest the defendant upon a fresh writ until the plaintiff has taxed the costs. *Molling and others assignees of White and Lubbreck, bankrupts, v. Buckholtz, 3 Maule and Selw. 153.*

If the rule be obtained after a justification of bail, where defendant is in custody, and the plaintiff makes a new affidavit, in order to charge him in custody again, under pretence of not liking the bail, and to keep defendant in custody, by charging him with a declaration upon the same bonds he was originally held to bail for, the court will discharge that rule to discontinue. *Belchier v. Gansel, 4 Burr. 2502.* although the venue be changed in such action.

If obtained by unfair practices.

Formerly all suits depending at the time of the demise of the king were thereby discontinued; but it is now otherwise by stat. 1 Ed. 6. c. 7. see 4 & 5 W. & M. c. 10. 11 H. 6. c. 6. as to prosecutions.

Demise of king.

In replevin, the avowant though an actor, cannot have this rule. 1 *Str.* 112. *Long v. Buckeridge.*

In replevin the avowant cannot have rule.

FEIGNED ISSUE.

THIS is generally directed either by the court of Chancery or Exchequer, where in a suit a matter of fact is strongly controverted, these courts being so sensible of the deficiency of trial by written depositions, that they will not bind the parties by their decree, but direct the matter to be tried by a jury; especially such important facts as the validity of a will, or whether A. is heir at law to B. or the existence of a *modus decimandi*, or real and memorable composition for tithes; therefore as no jury can be summoned to attend the Chancery, or Ex-

Generally directed by the courts of equity.

chequer on the equity side; the fact is usually sent to be tried by the court of Chancery to the King's Bench, and sometimes to the Common Pleas; but the court of Exchequer to the law side of their own court upon a feigned issue; wherein the plaintiff declares, that he laid a wager of 5l. with the defendant, that A. was heir at law to B. and then avers that he is so; and brings this action for the 5l. The defendant allows the wager, but avers that A. is not the heir to B.; and thereupon the issue is joined.

The interlocutory order in Chancery directs, in what court the issue is to be tried, and what the question should be, who is to be plaintiff and defendant, and any and what particular fact to be admitted at the trial; and in some cases that the plaintiff or defendant be examined as witnesses, and that the judge should indorse upon the postea, such special facts as should appear in evidence. To proceed, the order passed and entered, with one of the counsel's brief at the hearing, and other necessary instructions, should be given to a common law barrister, or a special pleader, to prepare a draft of the issue, a copy of which must be delivered to the adverse solicitor, and if any material objection should be made to the draft, an appointment should be made between the counsel on each side; and if they cannot agree, the original order with the draft of the issue, must be left with the master in Chancery, to whom the order refers to settle the issue in case the parties differ; a warrant must be taken out from the master's office *upon leaving* the draft of the issue, and successive warrants taken out to settle the issue, and served upon the adverse clerk in court: the master may be attended by counsel; but if the *question* directed to be tried by the order is to be varied, an application must be made to the court; the issue being finally settled, the record is to be made up as in common causes, and the usual proceedings had, for which abundant instruction is given in the former part of this work.

If the parties are desirous of trying the issue by a special jury, it seems that the application for that purpose should be made to the court of Chancery. 2 P. Wms. 68. After trial present a petition for leave to set the cause down to be heard upon the equity reserved, leave with the petition a copy of the decree and of the record and the postea thereon, for the Lord Chancellor. For much information upon this head, see *Turner's Practice in the Court of Chancery by Venables*, 1 Vol. 314, &c.

When a feigned issue is directed by a court of law, the costs follow the verdict; but when an issue is directed by the court of Chancery, then this court gives no costs. *Herbert v. Williamson*, 1 Wils. 324. 1 Wil. 261. *Vide Hoskins v. Lord Berkeley*, 4 Term Rep. 402, where two issues were directed, plaintiff succeeded on the first issue, and the defendant on the second issue; defendant obtained a rule why the master should not tax his costs on the second issue. The court thought themselves bound at first by the authority of *Herbert v. Williamson*; but strongly intimated an opinion, that as feigned issues were only granted by leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent, that the costs should be in the discretion of the court. But it afterwards appearing in this case, that these issues had been tried without consent of the court, they ordered all the proceedings to be staid, adding, that such a proceeding was a contempt of the court.

But if a question of mere law arises in the course of a cause, as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder, or an executory devise: it is the practice of the court of Chancery, to refer it to the court of King's Bench or Common Pleas, upon a case stated for that purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. But the Exchequer direct the issue to be tried on the plea side of their own court.

Court of Chancery refer to the K. B. or C. P. on the words of a will, by way of case.

To proceed therefore in this matter, a case is settled by counsel on both sides, and signed; then move for a *conciſum*, the same as on a special case; set down the case with the clerks of the papers, and deliver each judge a copy of the case, as settled, before argument.

How to proceed.

Issue directed by the court of Chancery, which defendant was desirous of trying, but which (it was suggested) the plaintiff wished to delay, and on that ground, notion that the defendant might be at liberty to carry the record down to trial at the next assizes, observing that by the common law the defendant could not carry it down *by provise*; court thought the application reasonable, and granted rule absolute in the first instance; saying that the plaintiff would not be damaged by it, for that

Court will permit defendant to carry a record of an issue directed down to trial, on a suggestion that plaintiff intends to delay it.

if he chose to take the record down himself, the costs of this application must be paid by the defendant. Rule abs. *Humpage v. Rowley*, 4 Term Rep. 767.

POPULAR ACTIONS.

Compounding them.

No informer can compound with defendant, but by the consent of the court, made perpetual by 27 Eliz. c. 10.

By stat. 18 Eliz. c. 5. sect. 3. " No informer or plaintiff shall compound or agree with persons that shall offend against any penal statute for an offence committed; but after answer made in court unto the information or suit; nor after answer, but by order of that court; that if any person shall offend, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty's courts at *Westminster*, and be convicted, shall stand on the pillory, &c. and be disabled to be plaintiff or informer in any suit upon any statute, popular or penal; and forfeit 10*l.* &c." Sect. 4.

Penalties given to persons certain, not generally.

This act not to restrain any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty, or suit, is or shall be specially limited or granted, by virtue of any statute; and not generally to any person that will sue. Sect. 6.

To what the act extends.

It seems clear, both from the preamble and the whole tenor of the statute, that it extends only to suits by common informers, and not to those by a party grieved 2 *Haw.* 279. 1 *Salk.* 30.

Leave to compound denied upon the statute.

In an action for making and selling gold rings, of less fineness than statute directs, moved for leave to compound without consent. *Per Cur.*—It is in the discretion of the court to give leave to compound; and afterwards they refused the motion. *Howell, qui tam, v. Morris*, B. R. 1 *Wils.* 79.

Leave given to compound on the statute of gaming.

Poole moved for leave to compound on the part of the prosecutor, upon the statute of gaming, upon an affidavit that the defendant and one A. B. used to play at cards together, and that the defendant had won diverse sums of A. B.; that A. B. was become a bankrupt, and that the assignees who set this prosecution on foot, were satisfied with respect to the defendant; and the court granted the motion. *Ibid.* 130.

On an affidavit of the defendant's poverty, the court will give leave to the prosecutor *qui tam* to compound, though in execution. *Str.* 167. *Bradshaw v. Mottram.* Poverty.

Rule last term was obtained to stay proceedings in an action on penalties under the lottery act, on payment of 20l.; for the non-payment of which, an attachment was now moved for.—Lord Kenyon said, the court would not grant a rule to stay the proceedings in a penal action, on paying the sum agreed upon, but upon a supposition, that the defendant undertook by his application to pay that sum. Rule abs. *Rex, qui tam, v. Clifton, 5 Term Rep.* 258. *E. 33 Geo. 3.* If in a penal action, a rule be obtained to stay the proceedings on the sum agreed on; an attachment may be moved for the non-payment of that sum.

The court gave leave to compound in an action for usury after verdict, favorable circumstances appearing, which would have justified a motion for a new trial. *Maughan, qui tam, v. Walker, 5 Term Rep.* 98. (a) After verdict granted.

Ordered, that in future every rule to be drawn up for compounding any *qui tam* action do express therein, that the defendant doth thereby undertake to pay the sum, for which the court hath given him leave to compound such action. *R. E. 33 Geo. 3.* Defendant now to undertake to pay sum.

This motion is made upon the affidavit of one of the parties, stating, that an action is brought upon such an act of parliament, and that the declaration contains penalties to the amount of 150l. that since, the said defendant has pleaded *nil debet*, and that the plaintiff and defendant have agreed to compound the same for the sum of 50l. and that no more is given or taken, nor is it compounded in any other way than by leave of the court. How to proceed. Affidavit.

Give this affidavit to counsel, likewise the plaintiff must give a brief upon a slip of paper to consent to the motion on payment of the sum of 50l. agreed, his fee half-a-guinea.

The court made a rule, that where they give leave to compound a penal action, the king's half of the composition shall be paid into the hands of the master of the Crown-office, for the use of his majesty, and it is now paid before the rule drawn up. *Brown, qui tam, v.* To whom the money is to be paid.

(a) See *Bosanq. and Puller, 18.* It was refused where action brought on 25 *Geo. 3, c. 36,* for keeping a disorderly house. *Bellis v. Peale.* See 38 *Geo. 3. Tidd, 471. 2 Black. Rep.* 1157.

Bailey, 4 Burr. 1929. The receipt of the master of the Crown-office, is taken to the clerk of the rules, before he will draw up the rule.

ARBITRATION.

See 2 Burr.
701.

ARBITRATION, or arbitrage, is where the parties injuring and injured, submit all matters in dispute concerning any personal chattels or personal wrong, to the judgment of two or more arbiters or arbitrators, who are to decide the controversy: and if they do not agree, it is usual to add that another person be called in as umpire (*imperator* or *impar*.) to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award: and thereby the question is as fully determined, and the right transferred or settled as it could have been by the agreement of the parties, or the judgment of a court of justice.

A submission to arbitration may be before any action brought, or after the action commenced, and before the trial, or when the cause is called on for trial.

1. If before any action brought, it is in the power of the parties to refer the dispute to arbitration by bond; 2. Where an action is depending, and before the cause is set down to be tried, the parties may consent by their counsel, to refer the matters in difference to arbitration, by a rule or order of the court; 3. But if the cause is entered for trial, then on its being called on, the parties may agree to refer under an order of *nisi prius*, which order is afterwards made a rule of court.

If no action
is depending.

Without any action depending, it is in the power of the parties submitting to arbitration, to proceed upon the following statute, and have the summary remedy by attachment.

Merchants de-
siring to end
controversies

By stat. 9 & 10 W. 3. c. 15. reciting that whereas it hath been found by experience that references made by rule of court hath contributed much to the ease of the subject, in determining of controversies, &c. for promoting trade, and rendering awards of arbitrators the more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account, or trade, or other matters, it enacts, that it shall be lawful for all merchants, traders and others desiring to end any controver-

sies, suits, or quarrels, for which there is no other remedy than by personal action, or by suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons shall be made a rule of any of his majesty's courts of record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond, or promise; whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission, or promise, or condition of their respective bonds, shall or may upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same was agreed to be made a rule of court, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said courts that the parties shall submit to, and finally be concluded by the arbitration, or umpirage, which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute same or any part thereof, shall be subject to all penalties of contemning a rule of court; and the court on motion, shall issue process accordingly; which process shall not be stopped or delayed in its execution by any order, rule, command or process of any other court, either of law or equity, unless it shall be made appear on oath, to such court, that the arbitrators or umpires misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption, or other undue means.

by arbitration, may agree to make submission a rule of court.

Which upon affidavit shall be done.

In case of disobedience, party neglecting, &c. shall be subject to attachment.

Unless award be set aside for corruption, &c.

The intent of this act was to put submissions, where no cause was depending in court, upon the same footing with those where there was a cause depending; and it is only declaratory of what the law was before, in the latter case. *2 Burr.* 701.

The intent of the act.

This statute is confined to disputes of a civil nature. Therefore the court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment. *Watson v. M'Cullum*, 8 Term Rep. 250. And a parol submission is not within the statute. *Ansell v. Evans*, 7 Term Rep. 1. Nor a submission in writing, unless it is agreed to be made a rule of court. But where there is such an agreement, it seems the court will enforce the execution of a parol award by attachment.

Confined to disputes of a civil nature.

Parol submission.

Barn. 54. If there be a consent in the bond, to make the award a rule of court, instead of the submission to the award, the court have jurisdiction to grant an attachment. *Pedley v. Westmacot*, 3 *East*, 603. *Powell v. Phillips*, E. 30 *Geo.* 3, cited by the master. 2 B. & P. 444. 2 *Str.* 1178, *contra*.

When an umpire may be chosen.

Arbitrators having power to choose an umpire, may elect one immediately, previous to entering upon the examination of the matter referred to them. 2 *Term Rep.* 644.

Time on bond may be enlarged by a memorandum indorsed on the back, if stamped.

It is now determined, that the bonds of arbitration may be enlarged before the time is expired by a memorandum indorsed thereon, and signed by the parties, stamped with an agreement stamp:—although it was not added, that such agreement should be made a rule of court: such agreement includes all the terms of the original submission to which it has reference, and the party is liable to an attachment, for non-performance of the award made, within such enlarged time. *Evans v. Thomson*, 5 *East*, 189.

Motion to set aside an award not to be made last day of term.

A motion cannot be made for a rule *nisi* to set aside an award on the *last day of term*, nor can counsel be heard on that day, to *shew cause* against such rule; but the same must be enlarged, and made a peremptory rule for the next ensuing term. R. M. 36 *Geo.* 3.

Awards considered with greater latitude and less strictness than formerly.

Awards are now considered with greater latitude and less strictness than they were formerly. And it is right that they should be liberally construed; because they are made by judges of the parties own chusing. They must have two properties, to be *certain* and *final*. But the certainty may be judged of according to a common intent, and consistent with fair and probable presumption. 1 *Burr.* 277. *Hawkins v. Calclough*.

Will not set aside award for defects appearing on the face of it, after the time limited.

The court will not set aside an award though for defects appearing on the face of it, after the expiration of the time limited by the statute. *Andrews* 297. 1 *East*, 276. *Lowndes v. Lowndes*. And a party cannot in shewing cause against an attachment impeach the award for defects not appearing on it. *Holland v. Brooks*, 6 *T. R.* 161.

If motion be for an attachment.

But upon application for an attachment for non-performance of the award, it is competent to the parties to object to the award, for any illegality apparent on the award, though the time for applying to set aside the award is expired. *Pedley v. Goddard*, 7 *T. R.* 73. see 1 *East*, 277. the reason by *Lawrence, J.*

The statute does not extend to such awards, as are made in pursuance of an order of *nisi prius*, but only where the submission is by obligation. 2 Burr. 701. *Lucas d. Markham v. Dr. Wilson*, 1 Str. 301. S. P. *Anderson v. Coxeter*. Does not extend to awards made by order of *nisi prius*.

Upon a submission by bond to refer without making any mention of costs, the arbitrator has no authority to award the costs as *between attorney and client*; but the plaintiff waiving his costs, and having only demanded the principal sum, took his attachment for that sum. *Whitehead v. Firth*, 12 East, 165. An arbitrator cannot award costs without their being named in bond.

But an arbitrator may award costs without any express authority for that purpose. *Roe v. Doe*, 2 Term Rep. 644. (a) Costs.

How to proceed to make Submission a Rule of Court.

Before any application is made for an attachment or to set aside an award, the submission must be made a rule of court, which is done on an affidavit by one of the witnesses of the due execution of the bond or agreement containing the submission; and if he refuse to make it, the court will compel him. 1 Str. 1. *Clarke v. Elwick*. The court said, every witness does by his signing, undertake to prove it, when required. 10 Mod. 332. *Barnes*, 58. S. P. And to proceed by attachment there must be personal notice of the award, and a demand of the money awarded. 12 Mod. 257, 312. A copy of the rule of court and award must be served at the time of the demand, and the original rule and award shewn to the party. 2 Str. 1178.

C. G. of, &c. maketh oath and saith, that he was present at the time of signing and sealing the bond or obligation hereunto annexed; and that C. D. of, &c. therein mentioned, did duly sign, seal, and as his act and deed deliver the said bond, in the presence of this deponent, and that the name C. D. set and subscribed to the said bond, is of the proper hand-writing of the said C. D. and that the name C. G. set and subscribed as the witness thereto, is of the proper hand-writing of this deponent. Affidavit of the due execution of the bond.

This affidavit is to be engrossed on a 2s. 6d. stamp How to proceed to get an attachment.

(a) What is a consent or submission, vide *Barnes*, 54, 55. 2 Str. 1178. 1 Salk. 72. 1 Ld. Raym. 674.

paper; give it to counsel "to move to make the submission a rule of court;" pay him 10s. 6d.; draw up the rule with the clerk of the rules, pay 2s. per sheet, make copy thereof, and of the award, with the names of the arbitrators and witnesses, then the person who is to receive the money must serve a copy of the rule and award, and demand the sum awarded, which not being paid, make the following affidavit to move for an attachment, and also an affidavit of the due execution of the award; which see after.

In the K. B.

Affidavit of the due execution of the award.

E. F. of, &c. maketh oath and saith, that he this deponent did see A. B. of, &c. sign, seal, publish, and declare his award in writing hereunto annexed; and the name of A. B. set and subscribed to the said award as the party executing the same, is of the proper handwriting of the said A. B. and that the names E. F. and G. H. set and subscribed thereto as the witnesses attesting the execution of the said award, are of the respective handwriting of this deponent, and the said G. H.

In the K. B.

Affidavit of the demand and refusal.

The place mentioned in the award.

A. B. of *Fleet-street, London*, grocer, maketh oath and saith, that he this deponent did, on the 4th day of *June* last, personally attend from the hour of one, until the hour of two of the clock in the afternoon of the same day, at *in Fleet-street, London*, and then and there demanded of C. D. named in the award hereunto annexed, who also attended, the sum of 50l. awarded due to this deponent, pursuant to the award hereunto annexed: but the said C. D. did not then pay to this deponent the said sum of 50l. or any part thereof: and this deponent further saith, that having, on Thursday next after one month from Easter day, in this present Easter term, caused the submission of this deponent, and the said C. D. to the said award, contained in a certain bond or obligation, bearing date the 2d day of *April*, 1817, to be made a rule or order of this honourable court, he the deponent, on the *day of* last, personally served the said C. D. with a true copy of the said award and rule or order of this honourable court, and at the same time shewed to him the said original award, rule or order; and demanded of him the said C. D. the said sum of 50l. so awarded due to this deponent as aforesaid: but the said C. D. did not then, or at any time afterwards, pay the same, or any part thereof, to this deponent, and

the whole of the said sum of 50l. now remains wholly due and owing to this deponent.

There must be a positive affidavit of personal notice of award and demand of the money all at one time on motion for an attachment, because it brings the party into contempt. 12 *Mod.* 257. *Anon.* 1 B. & P. 394.

Affidavit must be positive as to the demand.

If an award be made a rule of court, and the party who refuses to obey the award absconds, so that he cannot be found on a week day, service thereof on a Sunday is sufficient to bring him into contempt, whereon to have an attachment. *Ibid.* 158.

If party absconds.

If an arbitrator under a reference between A. and B. administrator, award that B. shall pay a certain sum on the amount of A.'s demand, B. cannot afterwards object, that he had no assets, but may be attached for non-payment. *Worthington et al. v. Barlow, Adm.* 7 *Term Rep.* 453.

If under reference, the arbitrator awards the defendant administrator to pay, it admits assets to pay.

In the case of *Pearson v. Henry*, adm. 5 *Term Rep.* 6. the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it; this was held to be no administration of assets. Therefore be cautious how you refer in these cases; but it may be to ascertain the amount of plaintiff's demand only.

The arbitrator ascertained the amount of plaintiff's demand only.

Give affidavit to counsel, "to move for an attachment for not paying the money on the award in pursuance of the rule of court;" fee 10s. 6d. it is a rule to shew cause, pay 2s. per sheet; draw it up at clerk of the rules, and serve copy thereof; make affidavit of the service; give counsel one guinea to make it absolute, which being done draw up rule, pay 2s. per sheet; take it to the Crown-office to your clerk in court, who will make out an attachment, fee 18s. 6d. get a warrant thereon, and it to an officer, pay him one guinea for the caption. (a).

How to move for the attachment.

Affidavits in support of, or in answer to a rule for setting aside an award made a rule of court, under the statute, there being no action previously brought, nor any cause in court, need not be intituled. *Bainbridge v.*

Affidavits when need not be intituled.

(a) It is discretionary in the court whether they will enforce the award by their attachment. 1 *Str.* 695. 1 *Crompt.* 270. 2 *Str.* 1152.; as if the party became bankrupt and has obtained his certificate.

When to be intituled.

Houlton & an. 5 East, 21. But where an attachment is applied for, for non-performance of the award, the affidavit in answer to the rule, must be intituled, *The King v. —*, though those upon which the rule is obtained, need not be intituled, where there was no cause previously in court. *Bevan v. Bevan, 3 Term Rep. 601.* See *Reference on an order nisi prius.*

Improper stamp.

If an award be made on an improper stamp, and no application be made to enforce it, the court will not set it aside. *Preston v. Eastwood, 7 Term Rep. 95.*

The want of a proper stamp to be mentioned on motion to set award aside.

And if an objection to the stamp be not alledged as a ground for obtaining a rule to shew cause to set aside the award, the court will not suffer it to be relied on afterwards, when cause is shewn. *Liddell v. Johnstone. H. 38 Geo. 3. Tidd. 749.*

Reference back to the same arbitrator under stat. 8 & 9 W. 3.

A motion that an award should be referred back to the same arbitrator to reconsider it, on the ground, that he had not sufficient materials before him when he made it, must be made *before the last day of the next term, after such award made*, according to the stat. 8 & 9 W. 3 c. 15. s. 2. although the arbitrators be not charged with corruption or undue means. *Zachary v. Shepherd. 2 Term Rep. 781.*

Where time limited by the bond, and afterwards enlarged by consent, no action on bond.

Where the time was limited by the bond, and afterwards enlarged by consent; held, that no action could be maintained on the bond to recover the penalty for not performing the award made after the time first limited. *Brown v. Goodman, 3 Term Rep. 592.(n)*

You cannot proceed by action, and also by attachment for non-performance; if you bring the action, the court will not let you waive it, in order to apply for an attachment. See 1 B. & P. 81. *Badley v. Loveday.*

As to the Rule to refer.

Submission by rule of court between the parties in the cause is not confined to the subject matter.

A submission by rule of court of all matters in difference *between the parties in the cause*, is not confined to the subject matter, in the particular action then depending; but will extend to cross demands, between the parties, though not pleaded by way of set-off; and the costs being to abide the event will make no difference. 2 T. R. 645. *Malcolm v. Fullarton.* But a reference of all matters in difference *in the cause between the parties*, is confined solely to the matters in dispute in that particular action. *Ib. 644.*

But references of all matters in difference in the cause is.

A submission to an award between A. and B. the parties on the record, having been made a rule of court, which award not having been made in time, the dispute had been referred to a second arbitrator to settle by B. and C. who were the real parties in the suit: no attachment can issue against B. for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*, 2 T. R. 643. And as the court had no jurisdiction in this case, they could not go into the merits, though B. consented to waive the objection. *Ibid.*

real parties in the suit, court refused an attachment for not obeying

A submission between A. & B. having been made a rule of court, and award not having been made in time, the dispute had been referred to a second arbitrator to settle by B. and C. who were the parties to the award.

An agreement to refer all matters in difference to arbitration, is not sufficient to oust the courts of law or equity of their jurisdiction. 8 T. R. 139.

Agreement to refer is not sufficient to oust the courts of their jurisdiction.

In case wish (before the cause is set down to be tried) to have a rule of court to refer all matters in difference between the parties in the cause, (which saves the expence of a trial,) to an arbitrator, it is done by giving a counsel on each side a brief for that purpose; fee 10s. 6d. each; who will sign same, take them to the clerk of the rules, he will draw up the rule, a copy of which is afterwards served on the attorney on the other side, with an appointment of the arbitrator to hear the parties, and a case is made by the attorneys on each side, and delivered to the arbitrator previous to the meeting. Of course the witnesses are to be sworn on both sides previous to the meeting at a judge's chambers; pay each witness being sworn 2s.

In case the arbitrator does not make his award in time, the rule may, by consent on both sides, be enlarged to another day. Counsel 10s. 6d. each; and draw up the enlarged rule; serve a copy on the opposite side with the appointment of the arbitrator.

If the Cause be referred at the Trial.

In case the cause be called on, and the parties wish to have an order of *nisi prius*, to refer all matters in difference between the parties in the cause, and there be bail in the action, the way is to take a verdict for a certain sum for the plaintiff, subject to the award of the arbitrator; and in this case, it behoves the attorney for the

If bail in the action.

If no bail in the cause.
Witnesses may then be sworn.

plaintiff, to take such verdict in a *sufficient sum*; for the arbitrator cannot award a greater sum than that for which the verdict is taken. 5 *East*, 139. But if there be no bail in the action, then no verdict is taken; but the order of *nisi prius* is made of course. And it is best for the attorneys on both sides, whilst the witnesses are attending the cause, to get them sworn before they leave the court, otherwise (if required) they must be sworn before a judge. This is done by the judge's clerk, who will make out a paper with the name of the cause, and the names of the witnesses. Or it may be prepared by the attorneys for the judge's signature.

In the King's Bench.

A. B. v. C. D.

The note for the witnesses to be sworn.

John Doe, Richard Roe, (names of all the witnesses) were this day of 1817, sworn before me to give evidence before *Isaac Fenn*, the arbitrator named in this cause, on the part of the plaintiff, (or defendant.) This note is given to the arbitrator at the time of the arbitration, that he may see that the witnesses have been sworn pursuant to the order or rule of court.

How to obtain the order of *nisi prius*.

After the sittings are ended, obtain the order of *nisi prius*, if in *London* or *Middlesex*, from the honourable Charles Law, King's Bench-walks, *Temple*; or from the judge's associate at the assizes, on which the arbitrator will make an appointment in writing, of a time, and place, for the parties and their witnesses to attend him; which appointment should be subscribed to a copy of the order of *nisi prius*, and served therewith on the defendant's attorney. Previous to the meeting, the arbitrator should be furnished with the brief in the cause as given to counsel, or a state of the case, and the names of the witnesses.

Witnesses examined, but not sworn nor objected to.

As to witnesses being examined on oath, if there be no objection made at the time of examination, the court will not set aside the award. See 1 B. & P. 91.

If arbitrator does not make his award in time, may be enlarged.

If the arbitrator does not finish in time, you may enlarge the order by consent (but first the clerk of the rules will make plaintiff's attorney move, that the order of *nisi prius* may be made a rule of the court); which being done, give brief to counsel, with 10s. 6d. each, who will sign their hands to same; carry them to the clerk of the rules, and he will draw up rule for the enlargement; the plaintiff's attorney serves copy on defendant's attorney, and an appointment must again be made by the arbitrator, and service thereof made as before. It cannot be enlarged without consent on both sides.

When the award is made, the arbitrator's attorney gives notice to the attornies, that the same is ready, and that each may have his part on such a day, on payment of his expences.

Cases.

An umpire having heard the evidence from the two arbitrators, on which he made his award, without re-examining the witnesses. After he had made the award, he was applied to by the party against whom it was made, to hear the evidence himself, and on his refusal the court was moved to set the award aside. But the court thought that as no application was made before he had made his award, to examine the witnesses, the rule should be discharged with costs. *Hall v. Lawrence*, 4 Term Rep. 689.

Per curiam.—We cannot ground an attachment for non-performance of an award on the affirmation of a Quaker; yet though it be in a suit between party and party, yet it is a criminal prosecution within the proviso of the statute 7 & 8 W. S. c. 34.

If an arbitrator profess to decide upon the law, and he mistake it, the court will set aside the award. *Kent v. Elstop*, 3 East, 18.

Where the lessor of the plaintiff, and the defendant in ejectment, had before referred their right to the land to an arbitrator, who had awarded in favor of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment. *Doe ex dem. Morris v. Prosser*, 3 East, 15.

Where the original award was lost, coming by the Bristol mail, which was robbed, the court on a proper affidavit granted a rule for an attachment nisi upon a copy of it. *Robinson v. Davis*, 1 Str. 526.

Peers and members of parliament are not to be attached, for non-payment of money pursuant to an award. Term Rep. 171. *Walker v. Earl of Grosvenor*, *Calmer v. Sir Knatchbull*, *ibid*, 448.

Where a cause was referred under a judge's order, with a proviso that the arbitrator should make his award on or before a day certain, but if he should not then be prepared, that the time should be enlarged from time to time as he might require, and a judge of the court might

If umpire receive the evidence from the arbitrators without examining the witnesses (unless required so to do) before his award, court will not set it aside.

Quaker no witness to ground an attachment for non-performance of award.

If arbitrator decide on the law.

If in ejectment a reference.

If the award be lost.

Peers and members not liable to attachment.

think reasonable and just; held that the time for making the award was duly enlarged by the arbitrator indorsing on the order on the day preceding the expiration of the original time that he required further time, although a judge's order granting such further time was not obtained until a day subsequent. *Reid v. Fryatt*, 1 *Maule and Selw.* 1.

Where two parties agreed to be bound by the opinion of a professional man, upon the construction of an act of parliament, who gave his opinion in favour of one; such opinion was considered as final and conclusive, though it recommended the printed statute to be compared with the parliament roll, before the matter was settled, under a doubt whether the stat. was not misprinted. *Price v. Hollis*, 1 *Maule and Selw.* 105.

Where a verdict is taken for the damages in the declaration, subject to a reference of all matters in difference, the court will not give leave to increase the sum in the declaration, and rule of reference, on an affidavit, that a large sum will probably be proved before the arbitrator. *Pearse v. Cameron*, 1 *Maule and Selw.* 675.

It seems, that under a reference of all matters in difference, the arbitrator will not of necessity be confined to the amount of the damages for which the verdict is taken. *Ibid.*

Submission to two, so as they made their award on or before a day certain, but if they do not by the time aforesaid, make their award, then to an umpire, provided he make his award on or before a subsequent day, the arbitrators finally disagree before their time expires, and declare they will not make any award, and do not make any: held that the umpirage might be made after the final disagreement of the arbitrators, before the time allowed them had expired. *Smailes v. Wright*, 3 *Maule and Selw.* 559.

As to an alteration made after sum filled up in award in the sum, void.

But good for the old sum if legible.

After an award made under the hand of an umpire, and ready for delivery, pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day, and before delivery of the award, is void; but the award is good, for the original sum which was still legible. *Henfree v. Bromley*, 6 *East Rep.* 309.

The court could no more consider this as avoiding the

instrument, than if it had been obliterated or cancelled by accident. *Ibid*, 312.

When a cause is referred to three, and they or any two of them are empowered to make an award, an award by two is good, provided the third had notice of the meetings, but otherwise it is bad. *Willes*, 215.

If there be a reference to three, two may make an award.

The general requisites of an award are, that it be certain, mutual, and final; but certainty to a common interest is sufficient. 1 *Burr*. 274. see 7 R. 76.

Requisites of award.

An award may be good in part, and bad in part, provided the latter be independent of and unconnected with the former. 8 *East*, 13. *Willes* 62, 253.

May be good in part, and bad in part.

An award made upon a reference of *all matters in difference between the parties*, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred. *Have v. Farmer*, 4 T. R. 146.

Award of all matters, &c. does not preclude plaintiff from suing upon a cause of action not submitted.

An award which is required to be made in writing, &c. and ready to be delivered at such a time, is complete, if made in writing and ready to be delivered by the arbitrator within the time, though not actually delivered. *East*, 584.

If the award be executed within the time, though not delivered, it is good.

By the general stamp act, 44 Geo. 3. c. 98, an award, whether under hand and seal, or under hand only, is subject, like a deed, to a stamp duty of 1l. 10s. under thirty common law sheets, and to a further duty of 1l. for every other fifteen sheets. The case in 5 *East*, 584, is now not law.

Awards are to be stamped.

An arbitrator may award costs without any express authority for that purpose. *Roe v. Doe*, 2 T. R. 644. In general in bonds or rules, costs are directed to abide the event, or else to be in the discretion of the arbitrator, and seldom left out.

May award costs without any authority.

And where by a rule of reference the costs were to abide the event of the award, the court held that the costs of the reference are included as well as the costs of the action depending. *Wood v. O'Kelly*, 9 *East*, 436.

If costs are to abide event of award, costs of reference included.

Where the costs are directed to abide the event, that must be taken to mean the legal event. Therefore in trespass for pulling down gates, and an assault, and 5s. damages, court held plaintiff could recover no more costs than damages. 5 T. R. 138.

To abide event, means legal event. 5s. damages, no costs.

So if under 40s.

So if the award be under 40s. and the plaintiff could have recovered the debt in a court of conscience. *Ibid.* 139. See *Smith's R.* 426.

If award states something to be done.

But where award states something to be done, which proves that the event in fact is in favor of the plaintiff, he is entitled to costs.

If verdict for plaintiff cannot award a sum to be paid without costs.

And under an order where there is a verdict taken for plaintiff and costs, the arbitrator cannot award a sum to be paid to plaintiff without costs. *Say.* 177.

If costs are left to discretion of arbitrator.

Where the costs are left to the discretion of the arbitrator, he may either award a gross sum to be paid, or costs; see *R. temp. Hard.* 53. Generally it is awarded that the costs be taxed by the master, 2 *Str.* 737. And such costs shall be taxed between party and party. *Cas. temp. Hard.* 161. *Cowp.* 127. see *Willes*, 62.

Arbitrator cannot charge expences.

It seems an arbitrator cannot without authority, charge a certain sum for his expences. 8 *East*, 13. *George v. Lousley.*

Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney and client. But the plaintiff waving his costs, and having only demanded the principal sum awarded, took his attachment for that sum. *Whitehead and others v. Firth*, 12 *East*, 165.

As to enlargement of time where award is made.

Where an award is made after the time is originally given to the arbitrators, but authority was also given to them to enlarge the time, an award within the enlarged time authorized is good upon the face of it, though it do not recite that the arbitrators did in fact enlarge the time; but the court will not grant an attachment for the non-performance of the award, without the verification of the fact. *George v. Lousley*, 8 *East*, 13.

Where costs of cause and of special jury are submitted.

Where the costs of the cause, and of the special jury are distinctly and separately submitted to the discretion of the arbitrators, they must distinctly adjudicate upon each. *Ibid.*

An award that actions be discontinued, and each pay his own costs, good.

An award that certain actions be discontinued, and each party pay his own costs, is final, and good: being in effect an award of a *stet processus*. *Blanchard v. Lily*, 9 *East*, 497.

Where a cause involving a question of law was referred to a barrister under the usual rule, and he made his award, but the question did not appear on the face of it; the court refused to open the award again. *Chace v. Westmore*, 13 East, 357. But see 3 East, 18, *contra*, *Kent v. Elstop*; but it appeared on the face of the award.

Reference which involves a question of law.

If the costs are awarded to be paid to plaintiff on a particular day to be taxed, it is his business to have them taxed before the day. *Willes* 62.

As to costs to be paid on a particular day.

The assignees of a bankrupt, having received 1500l. from a debtor to the bankrupt, as a debt due to his estate, and having commenced an action for a further demand on the same account, to which he had only pleaded the general issue, agree with him to refer all matters in difference between the parties in the cause; the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appear to have been paid by mistake. 2 T. R. 615.

Assignees of bankrupt having received 1500l. and commenced an action for a further demand, agree to refer, the arbitrator has power to award a repayment, a part already received.

How to proceed after Award executed, where no Verdict is taken. (a)

If the award is in favor of the plaintiff or defendant, costs are of course given as to the suit by the rule; therefore get an appointment from the master at the foot of the rule of court, to tax the costs; serve copy with the appointment on the opposite attorney, and, on attendance, the master will tax the costs, and mark them on the rule; and if the party against whom the award is, does not pay the money, make a copy of the rule of court, and the master's *allocatur* thereon, as also a copy of the award, and let your client the plaintiff first examine copies thereof; then let him deliver the copies to the defendant; shewing the original order and award, and at the same time demand the money, viz. the sum awarded, and the costs: if he does not pay them, move on the following affidavit for an attachment.

Where there is no verdict taken.

N. B. A letter of attorney may be made for this purpose; but it is too expensive, as there must be an affidavit of the due execution.

(a) The order of *nisi prius* must be made a rule of court in the first instance, after award made, and before the costs are taxed by the master.

(b) In the K. B. (name the cause.)

Affidavit of service of rule, and allocatur for costs, and the demand of the court.

A. B. of, &c. the above-named plaintiff, maketh oath and saith, that he this deponent did on the day of last, personally serve the above-named defendant with a true copy of the rule and *allocatur*, and also a true copy of the award hereunto annexed, and at the same time shewed him the original rule, *allocatur*, and award, and demand of him the said defendant, the payment of the sum of 20l. awarded, due to him this deponent by W. G. of, &c. the arbitrator, named in the said award, and also the payment of the sum of 14l. for the costs taxed and allowed to him this deponent in the said cause; but the said defendant did not then pay the same, or any part thereof to this deponent, and the whole of the said sums of 20l. and 14l. still remain due and owing from him the said defendant, to this deponent.

If by letter of attorney.

In case there be letter of attorney made, the form of the affidavit of the execution of the bond will do, by changing the words, saying did see J. K. duly sign, seal, and as his act and deed deliver the letter of attorney hereto annexed, &c.

No poundage.

The sheriff is not entitled to poundage upon an attachment for nonpayment of money awarded. *Rex v. Palmer*, 2 East, 411.

If party cannot be found.

If the party cannot be found so as to demand the money on affidavit of the facts, court will make a rule to shew cause, why leaving copies of award, rule, and master's *allocatur* at his house, and demanding the money of his wife, should not be deemed good service.

Cannot arrest on an attachment on Sunday.

It is settled that an attachment for non-performance of an award is only in the nature of a civil execution, and therefore no arrest can be made on it, on a Sunday; also that the prisoner under such an attachment may take the benefit of the lords' act. *The King v. Miners*, 1 Term Rep. 266. Vide *Cowp. Rep.* 136.

(b) In this case, affidavits to be intituled in the cause depending, 2 Term Rep. 613; or for a rule to set aside the award. But after the rule *nisi* granted for an attachment, the affidavits in answer to such rule, must be intituled, *The King against* ———. 5 East, 21. (in notes.)

When there is a Verdict and Bail.

Frequently where there is bail, and a cause is referred, the plaintiff, to prevent the bail being discharged, takes a verdict for his demand, subject to the reference: in that case, the plaintiff is to take care his verdict is for a sufficient sum to cover his demand, as the sum cannot be enlarged, though it may be diminished, and he will, if in term time, give a rule for judgment on the postea. (a) If the award should be in his favour, he may then make his election either to proceed on the verdict, or by an attachment. If he proceeds on the verdict, the rule for judgment being expired, he may stamp the postea and tax the costs as in other cases, producing to the master, the award, and rule of reference, and take out execution.

(a) Or the first day of the next term, if cause be tried sittings after term.

Where a verdict is taken by consent, subject to the award of an arbitrator, judgment cannot be signed without a rule for judgment being given. And if it is, proceedings against the bail will be set aside. *Hayward v. Ribbans*, 4 East, 310.

There must be a rule for judgment given.

Personal service of the award is *not* necessary to warrant the issuing of execution, if the attorney for the defendant has been served with a copy of the award. See 3 B. and P. 244.

In this case personal service of award is not necessary.

In case the plaintiff wishes to proceed under the order of *nisi prius* for an attachment, then move to make it a rule of court, tax the costs, and proceed as in p. 788.; but I hardly think that after a verdict, the plaintiff will proceed by attachment, the other method being preferable, as he may have execution against the goods, or lands, as well as a ca. sa.

If he proceeds under the rule though a verdict.

Where a verdict was taken for 1200l. damages and costs 40s. at the trial subject to the award of an arbitrator the 25th August 1801, awarded £1071. 16s. 1d. to be paid 12th November following, which not being paid, costs were taxed at 149l. in the whole, and plaintiff signed final judgment on that day, for 1200l. for which the verdict was taken, and 149l. costs, making together 1349l. On 17th November, a *fi. fa.* was issued to levy £1224. 3s. besides fees, poundage, and other expences, which sum consisted of the following items, £1071. 16s. 0d. for damages, £1 18s. 0d. interest from 12th November to 25th December, 149l. costs, *fi. fa.* 16s. 6d. and testatum 11s. 6d. warrant 3s. 6d. and letters, &c. 3s. 6d. In addition to these sums, the sheriff returned that he had levied 33l. 2s. 0d. for poundage. Rule why *fi. fa.* should not be

Where a verdict is taken pro forma at the trial for a certain sum, subject to an award, the sum awarded is to be taken as if it had been originally found by the jury. See 1 B. & P. 97. Higginson v. Nisbitt.

set aside, and money levied be returned. The motion was grounded principally upon a supposed irregularity in the plaintiff having entered his judgment without leave of the court. 1 *Salk.* 84. in point. Lord *Kenyon*. After the arbitrator has ascertained the sum to be recovered, such finding is in the place of the verdict, and must be considered the same as if the jury had originally found so much due; and then all the same consequences ensue. The plaintiff is only entitled to enter up his judgment for so much; and the sum for which the verdict was nominally taken, cannot be considered as in the nature of a penalty, for which the plaintiff is entitled to enter up judgment. The award was in the place of the verdict of the jury; and as there is no rule of practice obliging the party to apply to the court for leave to enter up judgment, I see no reason for making such a rule now: The interest, poundage, and costs of the levy were ordered to be returned, with costs of the application. The remainder of the money to be paid to the plaintiff. *Le v. Lingard*, 1 *East*, 401.

Of setting Award aside.

How to set
award aside.

The mode of setting aside the award is by application to the court, in which the action was depending, where the reference is by rule of court, or order of *nisi prius*. And unless the application be founded on some objection to the legality of the award appearing on the face of it, there must be an affidavit, stating the grounds upon which it is made; and it is usual to have an affidavit of facts, in answer to the application.

In practice it is usual when a rule for an attachment is moved for, to oblige the party who complains of the award to set it aside, unless the objections appear on the face of it; and then both rules come on together. 6 *East*, 910. This gives the other side an opportunity of answering the allegations, on which the objections to the award are founded.

Last day of
term no rule
nisi to set it
aside, nor can
counsel shew
cause it must
be enlarged.

If award made
on submission
by bond.

The court, as before stated, will not on the last day of term, hear a motion for a rule *nisi* to set aside an award; nor can even counsel be heard on that day, to shew cause against such rules; but it must be enlarged, and made peremptory for the next ensuing term. *R. M.* 36 *Geo.* 3. And if by bond, the motion must be made to set it aside before the last day of the next term, after it is made; and see 2 *Term Rep.* 781. So where it is to refer back the

award to same arbitrator to reconsider it, although the arbitrator be not charged with corruption, or undue practice. 2 Term Rep. 781. *Zachary v. Shepherd*. If it is referred back to reconsider.

If the party wishes to impeach the award upon the order of *nisi prius*, where a verdict has been taken, if the award be made before the term, he can only impeach it within the first four days of the next term, (if the rule for judgment be given on the first day.) If party wishes to impeach the award where a verdict taken.

The grounds for setting it aside are, that there is some objection to its legality, appearing on the face of the award itself, or from the reasons given by the arbitrators in support of it. 3 East, 18. *Kent v. Elstob*. Or else that there has been some irregularity, as want of notice of the meeting, 1 Salk. 71. or collusion or gross misbehaviour of the arbitrator. 2 Burr. 701. 3 Atk. 529. But the court on motion will not enter into the merits at large. 1 Str. 301. Salk. 71. 3 Atk. 529. 1 Saund. 327 (d). And they will not set aside the award of an umpire, because he received evidence from the arbitrators, without examining the witnesses, unless he were required to re-examine them, before the making of his umpirage. 4 Term Rep. 589. *all v. Lawrence*. But it seems partiality and improper conduct in an arbitrator, without hearing of defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned to perform an award. 8 East, 344. *addick v. Thompson*. And if the application be made due time, every ground of relief in equity against an award is equally open in this court. Every ground of relief is given.

PROCEEDINGS AGAINST JUSTICES AND CONSTABLES.

By stat. 7 Jac. 1. c. 5. If any action shall be brought against any justice of the peace, constable, &c. for any thing done by virtue or reason of his office, he may plead general issue, and give the special matter in evidence; if such justice, &c. shall have a verdict, he shall have double costs allowed. So if the plaintiff be nonsuit, or continue. N. B. The judge must certify that he was engaged in the execution of his office. *Grindley v. Holroy*, Dougl. 307. May plead general issue, and if a verdict, if judge certify, &c. double costs.

But if there be a special verdict, and it appears that the act done was so done by virtue or reason of his office, the master may tax double costs, though no certificate. *m v. Pickins*, *ibid*. 308. in notes. If special verdict.

No writ to be sued against any justice for what he shall do in the execution of his office, till notice given him. See 3 B. & P. 551, 553. as to the notice.

No writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served, on any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at his usual place of abode, or served at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained "the cause of action which the party suing claims to have against such justice of the peace;" on the back of which notice shall be indorsed the name and place of abode of the plaintiff's attorney or agent, who shall be entitled to 20s. for preparing and serving such notice. Stat. 21 Geo. 2. c. 44. s. 1. (a)

It has been deemed sufficient to entitle a justice to the benefit of this statute, that he conceived himself to be acting as a justice, though what he did was not in the regular execution of his office. *Burd v. Guneton*, Tidd, 29. He must have a month's notice of the writ or process intended to be sued out, as well as of the cause of action. 7 Term Rep. 631. *Lovelace v. Curry*.

Leaving at dwelling house will do.

In every case of service of a notice, leaving it at the dwelling house of the party has always been sufficient. 4 Term Rep. 465. *Ld. Kenyon*.

That he may, within one calendar month tender amends.

That it shall be lawful for such justice of the peace, at any time "within one calendar month after such notice given," to tender amends to the party complaining, or to his agent or attorney; and if not accepted, to plead such tender in bar, together with not guilty, and any other plea with leave of the court; and if on issue joined, the jury shall find the amends so tendered sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit or discontinue, or in case judgment shall be given for such defendant on demurrer, such justice shall be entitled to the like costs as he would have been entitled to, in case he had pleaded the general issue only; and if the jury find no amends tendered, or not sufficient, and also against the defendant on such other plea or pleas, then they shall give a verdict for the plaintiff, and dama-

If tender sufficient, verdict for defendant.

(a) The statute has prescribed a form, which must be implicitly followed; and it admits of no equivalent. *Lawrence, J.* 7 Term Rep. 635. *Lovelace v. Curry*.

in which he shall recover, with costs. s. 2. *Vide Buller* 1 P. 24.

If the justice obtains a verdict, double costs. 7 *Jac.* Double costs. e. 5.

That no such plaintiff shall recover any verdict against such justice, in any case where the action shall be founded on any act of the defendant, as justice of the peace, unless it is proved upon the trial of such action, at such notice was given as aforesaid; but in default of proof, such justice shall recover a verdict with costs. 4.

Plaintiff not to recover without proof of such notice.

That in case such justice shall neglect to tender amends, before issue joined, pay into court such sum of money as he shall see fit. s. 4. But it must appear, that action is brought against him as a justice in the execution of his office. *Vide 2 Black. Rep.* 859. Annex copy of notice to affidavit.

If justice neglect to tender, he may pay money into court.

That no evidence shall be given on the trial of any such action, of any cause of action (*except such as is contained in the notice hereby directed to be given.*) s. 5.(a)

Evidence not to be given of any cause but such as is contained in the notice.

Actions against Constables.

That no action shall be brought against any constable or other officer, or against any person acting by his order in his aid, for any thing done in obedience to any warrant of any justice, until demand made or left at the usual place of his abode, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal of such warrant, and that the same hath been read or neglected, for the space of six days after such demand; and in case after such demand and compliance, refusing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, &c. for any such cause, without making the justices defendants,

Action not to be brought against any constable, &c. acting in obedience to justice's warrant, till demand made of the copy of the warrant, and refusal thereof, &c.
See 3 Burr. 1742. 3 Esp. N. P. 226.
2 B. and P. 158. 5 East, 445. 1 H. Bl. 15.
5 East, 233.

) The privileges under the above acts only extend to cases where the justices, &c. are acting in execution of their office. *Vide 1 Str.* 446. 3 Burr. 1742. And the acts only extend to cases of torts, not to actions of another nature brought against officers. *Bull.* 24.

that on producing and proving such warrant at the trial of such action, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against such justice, and also against such constable, &c. then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction; and if the verdict shall be given against the justice, that in such case the plaintiff shall recover costs to be taxed, so as to include such costs as such plaintiff is liable to pay to such defendant or defendants for whom such verdict shall be found. *24 Geo. 2. c. 44. s. 6.*

Where defendants, in order to levy a poor's rate under a warrant of distress, granted by two magistrates, broke and entered the house, and broke the windows, &c. Held that they might be sued in trespass, without a previous demand of the perusal and copy of the warrant, according to the above statute. *2 Maule and Selw. 259. Bell v. Oakley and eight others.*

Where the judge shall certify the injury was wilfully committed, plaintiff to recover double costs.
Limitation of actions.

Where the plaintiff shall obtain a verdict, in case the judge shall in open court certify on the back of the record, that the injury was wilfully and maliciously committed, he shall be entitled to double costs. *s. 7.*

No action shall be brought against any justice for any thing done in the execution of his office, or against any constable, head-borough or other officer, or person, acting as aforesaid, unless commenced "within six calendar months after the act committed." *s. 8. (a)*

Notice of action to a justice for the party, for false imprisonment.

Sir,
You having on or about the day of
last, as one of his Majesty's justices of the peace in and
for the county of *Middlesex*, caused me to be apprehended,
and unlawfully committed to a certain common

(a) The action must be brought in the county where fact committed. *21 Jac. 1. c. 12. s. 5.* So against constables. Churchwardens and overseers of the poor taking a distress for a poor's rate are within the act *7 Term Rep. 270. Bull. N. P. 24.*

In the case of a continued imprisonment, the magistrate is liable to answer in an action for such part of the imprisonment suffered under his warrant, as was within six calendar months before the action commenced against him. *Massey v. Johnson, 12 East, 67.*

gaol or prison called _____, in and for the same county, and to be there imprisoned, and kept and detained in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of five days then next following; I do therefore, according to the form of the statute, in such case made and provided, hereby give you notice, that I shall at or soon after the expiration of one calendar month, from the time of your being served with this notice, cause a bill of *Middlesex* to be sued out of his majesty's court of King's Bench at *Westminster*, against you, at my suit, for the said imprisonment, and shall proceed against you thereupon according to law. Dated this _____ day of _____ 1817. D. M. of, &c.

A writ of latitat.

To A. B. esq. one of his majesty's justices of the peace in and for the county of *Middlesex*.

Indorse on the back of the notice the *christian* as well as the *surname of the plaintiff's attorney*, and *place of abode*; and say, attorney for the within-named D. M.

You having on or about the _____ day of _____ last, as one of his majesty's justices of the peace in and for the county of *Middlesex*, caused D. M. of _____ mercer, to be apprehended, (as in the other) I do therefore, as the attorney of and for the said D. M. in this behalf, according to the form of the statute in such case made and provided, hereby give you notice, that I shall at or soon after the expiration of one calendar month, from the time of your being served with this notice, cause a bill of *Middlesex* (a) to be sued out of his majesty's court of King's Bench at *Westminster*, against you, at the suit of the said D. M. for the said imprisonment, and shall proceed against you thereupon, according to law. Dated, &c. Yours, &c. E. F. attorney for the said D. M. No. 5, *Inner Temple Lane, London*. Direct the notice to the justice, as in the precedent.

Notice to the justice by the attorney to sue.

(a) A writ of latitat.

I do hereby, as the attorney of and for D. M. of _____ mercer, according to the form of the statute, in such case made and provided, demand of you, the perusal and copy of the warrant, by virtue or under colour whereof, you did on or about the _____ day of _____ last, apprehend the said D. M. and carry and convey him in custody to and before A. B. esq. one of his ma-

Demand of a constable of the perusal and copy of a warrant,

justice's justices of the peace, in and for the county of *Middlesex*. Dated, &c. Yours, &c. E. T. attorney for the said D. M. No. 5, *Inner Temple Lane, London*.

To Mr. C. D. Constable of

The like of a
gaoler.

I do hereby as the attorney of and for D. M. of _____, mercer, according to the form of the statute in such case made and provided, demand of you, the perusal and copy of the warrant of commitment and detainer, under which you received into your custody the said D. M. on or about the _____ day of _____ last, and kept and detained him in custody for the space of ten days, then next following. Dated, &c. E. F. attorney for the said D. M. No. 5, *Inner Temple Lane, London*.

To Mr. C. D. Gaoler of, &c.

As to the notice of the justice.

With respect to the notice to the justice, *two things* are requisite to state, *one that the plaintiff shall give notice in writing of the writ or process that he intends to sue out*; the other, *that such notice shall contain the cause of action*. *Grose, J. Lovelace v. Curry, 7 Term Rep. 634*. Also the place of abode of the attorney must be particularly stated. The statute was made to introduce a strictness of form in favour of justices, and it must be observed literally. *Lawrence, J. Ibid, 635*.

As to the notice.

Notice of the action on the case for false imprisonment and assault was held by *Yates, J.* not sufficient, to support an action of trespass, and false imprisonment. *7 Term Rep. 631. (n) Strickland v. Ward*.

A constable executing the warrant, and sued without magistrate.

A constable executing a warrant of a justice of peace, and sued in trespass without the magistrate, is within the protection of *24 Geo. 2. c. 44. s. 6.* and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought; though not within six days after such demand, as the act directs. *Jones v. Vaughan and Hall, 5 East, 445*. He acts at his peril till he does comply, and subjects himself in the interval, to be sued as any common person. *Le Blanc, J.*

If a first writ be issued before plaintiff can shew the second, he must have the first returned.

The plaintiff must shew at *nisi prius* that he proceeded upon a writ sued out within six months after notice of the action, although there be a continuing cause of action; and therefore the plaintiff must shew a return and continuance of the first writ, if the second be out of the time fixed by the notice. *Weston v. Fournier and another, 14 East, 491*.

One magistrate committing the mother of a bastard child to custody, for not filiating the child, is yet entitled to the previous notice of action required by the 24 Geo. 3. c. 44. though the jurisdiction over the subject matter is given to two magistrates by 18 El. c. 3. *Weller v. Toke*, 2 East, 364.

One magistrate acting where two were required, must have notice.

NOTICES OF MOTION.

IN many cases I have observed that no notice is necessary where there is to be a rule to shew cause in strictness; yet in some cases, in order to stay proceedings, it may be necessary; therefore I shall give precedents of different notices.

You having been served with a copy of a latitat at the suit of the above-named plaintiffs W. C. and R. W. on the day of last, to appear the 23d day of *January* next, by your attorney, in his Majesty's court of King's Bench, and the said writ not being returnable; I do hereby give you notice not to appear thereto, there being a mistake in the said writ. Dated this day of 1817.

Notice not to appear to a writ, where there is mistake in it.

Take notice, that this honourable court will be moved to-morrow, or so soon after as counsel can be heard, that the interlocutory judgment signed in this cause may be set aside for irregularity, with costs to be taxed by the master, and in the mean time all proceedings be staid, &c.

To set aside an interlocutory judgment.

Take notice, that this honourable court, &c. that the interlocutory judgment signed in this cause, and the writ of inquiry executed thereon, may be set aside for irregularity, with costs to be taken by the master, and in the mean time all proceedings be staid, &c.

To set aside judgment and inquiry.

Take notice, that this honourable court, &c. that the judgment signed in this cause, and the execution issued and executed thereon, may be set aside for irregularity, with costs to be taxed by the master, and that the sum of £61. levied and paid into the hands of the sheriff of *Mid-dlesex*, may be restored to the above-named defendant, and that the said sheriff may retain the same in his hands until the further order of this court, and in the mean time all further proceedings be staid.

To set aside the judgment and execution executed, and that the money paid, &c. be restored.

Take notice, that this honourable court, &c. for a rule to shew cause why the defendant should not be permitted

To file common bail.

to file common bail in this cause, and in the mean time all proceedings be staid.

To set aside all proceedings for irregularity.

Take notice, that this honourable court, &c. to shew cause, why all the proceedings in this cause should not be set aside for irregularity with costs, and in the mean time all further proceedings be staid.

To shew cause why it should not be referred to the master to compute the principal and interest upon bond.

Take notice, that this honourable court, &c. for a rule to shew cause why it should not be referred to the master to compute the principal and interest due upon the bond in question, and why, upon payment thereof, together with the costs to be taxed by him, the said bond should not be delivered up to the defendant to be cancelled.

To shew cause why judgment should not be set aside; and plaintiff answer the matters of the affidavit.

Take notice that this honourable court, &c. for a rule to shew cause why the judgment signed in this cause should not be set aside, for irregularity with costs, and why the plaintiff should not answer the matters of the affidavit, and that in the mean time all proceedings be staid.

To shew cause why the bail-bond and the proceedings thereon should not be set aside.

That this honourable court, &c. why the bail-bond assigned in this cause, and the proceedings thereon, should not be set aside with costs for irregularity to be taxed by the master, and in the mean time all proceedings be staid.

Why the writ should not be quashed, and answer the matters.

Take notice that this honourable court, &c. why the writ of latitat issued in this cause should not be quashed, and why the plaintiff should not pay the costs of this application, and that the plaintiff may answer the several matters mentioned in the affidavit.

To the sheriff to retain money.

Take notice, that this honourable court, &c. why the judgment in this cause, and the execution executed thereon, should not be set aside for irregularity; and why the money paid into your hands should not be restored to the defendant, and that in the mean time you retain the same until the further order of this court.

In case the motion is for a rule to shew cause, it is not *absolutely* necessary to give notice before hand; it is frequently given, in order that the rule nisi may operate as a stay of proceedings.

ERROR.

THE principal method of redress for erroneous judgments in the king's court of record, is by writ of error to some superior court of appeal; and lies for some matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of facts, but by an attain, or a new trial, to correct the mistakes of the former verdict.

A redress for erroneous judgments is by writ of error.

It appears that after verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or mis-spellings; and justice was perpetually entangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose, by no less than twelve statutes, to remedy these absurd niceties; and its endeavours have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated.

Formerly brought for trivial mistakes.

It is an original writ, issuing out of Chancery, and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record; and is in nature of a commission to the judges of the same or a superior court, by which they are authorized to examine the record, upon which judgment was given, and on such examination to affirm or reverse the same according to law. 2 *Bac. Abr.* 187. 2 *Ld. Ray.* 1403. 1 *Str.* 607.

An original writ.

A writ of error may operate as a stay of proceedings, though sued out before interlocutory judgment. *Emanuel v. Martin*, 2 *Maule and Selw.* 334. See 5 *East*, 145.

A writ of error lies from the inferior courts (of a judgment given in a county palatine. *Dy.* 321. 4 *Inst.* 214. 218. And by 34 & 35 H. 8. c. 26. s. 113. and 1 W. & M. c. 27. errors in judgment, in pleas real, mixed and personal before the justices in their great sessions in *Wales*, shall be redressed by writ of error in the King's Bench in *England*, and from the court of Exchequer in *Scotland*, returnable in parliament, 6 *Ann.* c. 26. s. 12. of a judgment at the sessions of *Old Bailey*, by commission, 2 *Leon.* 107. or of a judgment upon the plea roll in Chancery, *Dy.* 315.) into this court, and not into the Common Pleas. So it lies in this court, of a judgment in the Common Pleas. 1 *Roll.* 744. 4 *Inst.* 22. By stat. 27 *El.* c. 8. On

Error lies from inferior courts, &c. in this court.

Exchequer-chamber.

(a) *Lloyd v. Scutt*, Dougl. 350. 5 Mod. 230.

If proceedings are by original, error lies in the House of Lords.

judgment given in this court in actions in debt, detinue, covenant, account, case, trespass, or ejectment, originally begun therein by bill: and also on an action *qui tam* (a). it lies to the court of Exchequer-chamber, before the justices of the Common Pleas, and barons of the Exchequer; and from thence also to the House of Lords. (b) But where the proceedings in this court do not first commence therein by bill, but by original writ sued out of Chancery, this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the House of Lords, the *dernier resort* for the ultimate decision of every civil action. 1 *Saund.* 346. 1 *Sid.* 424. which upon hearing the matter of law, in which the error is assigned, reverse or affirm the judgment.

County palatine.

When a record is removed here from a county palatine court, by a writ of error, and that writ is nonprossed, the court will award execution. *Cooperthwaite v. Owen*, 3 *Term Rep.* 657.

Exchequer.

From the proceedings on the law side of the Exchequer, a writ of error lies into the court of Exchequer-chamber, and from thence to the House of Peers. But no judgment given by either are final, save only the House of Peers, to whose judicial decisions all other tribunals must therefore submit and conform their own.

Scire facias.

It does not lie in the Exchequer-chamber on an award of execution on a *scire fa.* only; but the writ must also include the judgment in the former action. 1 *Ld. Ray.* 98. *Andr.* 287. Nor in a *scire facias* against bail. 2 *Cra.* 171, 384. *Cro. Car.* 300. contra *Cro. Eliz.* 739. Twenty years are allowed for bringing a writ of error, in real and personal actions, 10 & 11 W. 3. c. 14. The stat. has the usual exceptions, in favor of infants, feme coverts, persons *non compos mentis*, imprisoned or beyond the seas.

Twenty years to bring error.

Who may have this writ.

The writ of error authorises the judges to affirm or reverse the judgment given: and all parties against whom judgment is given, ought regularly to join. 3 *Mod.* 134. *Carth.* 7. If judgment be against two, and one brings error, it is bad, even though the other is dead, if it does not appear on record; but if it does, then the survivor

(b) This statute does not extend to replevin, 2 *Roll.* 434. rescous. *Cro. Jac.* 171. *Scand. Magn.* 954. *Cro. Car.* 142. but must be brought in parliament.

may bring error. *Str.* 233. If against three executors, though they plead separately, all three must join. 1 *Wils.* 88. 2 *Str.* 977. But if one makes default, he may be summoned and severed. *Mod. Cas.* 40. If two join in error, and one will not assign, the court will give the other time to summon and sever. 2 *Str.* 783. It may be brought by a plaintiff to reverse his own judgment, if erroneous, in order to enable him to bring another action. 3 *Burr.* 1772. The writ must describe the suit by the names of all the parties. *Str.* 682. And a party may have error, though he was not an original party; as tenant by voucher, or resceipt. 1 *Roll.* 747. So by him who is privy, as by the heir. *F. N. B.* 21. 2 *Cro.* 160. By an executor or administrator. *F. N. B.* 21. So by a privy in estate; as by him in reversion or remainder, after a term for life or years, when determined. 1 *Roll.* 748. *Dy.* 16. Tenant in remainder may bring error against a common recovery, where tenant in tail, vouches, died before the judgment. 1 *Burr.* 410. But it must be by such privy as has benefit by the reversal. 1 *Roll.* 747. Bail shall not have error of a judgment against the principal, though joined with him. 1 *Lev.* 137. *Cro. Car.* 408, 575. It cannot be taken out in the name of the casual ejector. 2 *Burr.* 756. *George v. Wisdom.*

Plaintiff may bring error to reverse his own judgment.

What writ is to describe.

Bail.

Error ought to be sued against all the parties to the recovery. So against any who was party or privy to the judgment; and if any who was, has now nothing, yet he shall be named a defendant in error. *F. N. B.* 18. Error lies not on an interlocutory judgment; it can only be brought on final judgment. *Samuel v. Judin*, 6 *East*, 333.

Against whom it shall be sued.

It does not lie on an interlocutory judgment.

Teste and return. *N. R.* 298. *S. P.*

It may be tested before judgment, so as the judgment be given before the return of it; *March.* 140. 1 *Vent.* 96. 255. 1 *Roll. Abr.* 3, 4. 1 *Mod.* 112. But if plaintiff will not sign his judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set it aside. 1 *Term Rep.* 279. *Jacques v. Nixon.*

If error be brought on a judgment in this court, returnable in the Exchequer-chamber after the judgment be affirmed or reversed, the record and all things concerning the same, shall be brought back into this court, that further proceedings may be had thereupon, as well for execution as otherwise. But still the party may bring error in parliament. *Stat.* 27 *El.* c. 8.

After a affirmance in the Exchequer-chamber or reversal, the record to be brought back into the K. B.

The writ of error on a judgment in this court, is return-

Before whom returnable.

able before the justices of the Common Bench, and barons of the Exchequer, who are to be of the degree of the coif. *Ibid.*

The court will not set aside defendant's execution for the costs of a nonsuit after notice of allowance of error, because error can only be for delay.

Motion why the execution founded on a judgment of nonsuit should not be set aside, being sued out after plaintiff had served an allowance of a writ of error. *Buller, J.* Here it is apparent that there can be no error of which the plaintiff can avail himself; for if the record were manifestly erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favor. Rule discharged. *Kempland v. Macauley & another, 4 Term Rep. 436.*

As to being brought for Delay.

If error sued after time given on a promise not to sue.

If an attorney desires time, and says he will not bring a writ of error, notwithstanding which he does, it will, on affidavit of the facts, be quashed on motion; the court considering it as sued out against good faith. *Cates v. West, 4 Term Rep. 183. 2 T. R. 183.*

If error be brought purely for delay.

If the parties confess that the writ of error is brought purely for delay, the court will interfere, and will not permit them to abuse the forms of justice. Therefore, pending error, an action was brought on the judgment, and rule obtained to stay the proceedings; on shewing cause it appeared that the defendant and his attorney had declared that they would delay the plaintiff as much as possible by bringing error, if he did not comply with the terms proposed. Rule discharged. *Pool v. Charnock, 3 Term Rep. 79.*

If parties are to be restrained from bringing error, then legislature must interfere.

But where in a like motion it was shewn by plaintiff's attorney that he offered to waive the judgment if the attorney for the defendant would point out any error, which was refused; Lord *Kenyon* said, that the rule must be absolute. If it were fit that parties should be restrained from bringing writs of error, the legislature must interfere. But by the constitution of this country, every subject has a right to have his cause reviewed by a court of error. In this case perhaps the defendant's attorney might not know whether there was error or not. *Christie v. Richardson, 3 Term Rep. 79.*

Declaration by attorney.

The defendant's attorney had told the plaintiff, "that he must delay the payment of the debt and costs, as long as he could, as his client was already considerably in

'arrear to him." The court refused to stay the proceedings in the action on the judgment, pending the writ of error. *Law v. Smith*, Mich. 30 Geo. 3. The same point was ruled, in *Evans v. Gilbert*, on a declaration by one of the bail, that the writ of error was brought for delay. *Term Rep.* 436. (in notes.)

Declaration
by bail.

If a writ of error be brought on a nonsuit, the court will not set aside the execution for costs, as there can be no error of which the plaintiff can avail himself, *Kemp and v. Macartley*, 4 *Term Rep.* 436. 1 *H. Black.* 432. S. P. On a like motion, the court said, the practice not to stay the proceedings pending a writ of error must be confined to those cases where the party himself, his attorney or bail, declare that the writ of error is brought only for delay. Rule absolute. *Levett v. Perry*, 5 *Term Rep.* 569.

If error be
brought on a
nonsuit.

Judgment in debt on a recognizance of bail, defendant sued out a writ of error, plaintiff proceeded. Rule why proceedings should not be staid, pending error. It appeared in the affidavit, that the defendant's attorney had said, that the reason why he had brought the writ of error was, that if *Grant*, the defendant, should pay the money, pending the action, he should never get it again from *Phillips* (the defendant, in the original action,) but that while the cause was depending, he might prevail on him to settle it. Per Cur.—It is admitted, that when the party has declared that he brought the writ of error for delay, the court has refused to stay the proceedings. Now the expressions used in this case are equivalent to such a declaration. Rule discharged. *Masterman v. Grant*, 5 *Term Rep.* 714.

In debt, on
the recogni-
zance, pend-
ing error,
proceedings
refused to be
staid.

Of Bail in Error.

If error be brought, he that brings it must find substantial bail, according to the statute of 3 Jac. 1. c. 8. (made perpetual by 3 Car. 1. c. 4. s. 4.) which enacts, that no execution shall be staid by any writ of error, to be sued for the reversing of any judgment given in any action or bill of debt, upon any single bond for debt, or upon any obligation, with condition for payment of money only, or upon any (b) action or bill of debt for rent, or upon any contract sued in any court of record at *Westminster*, *Chester*, *Lancaster*, *Durham*, or the courts of great sessions in *Wales*, unless such person, with two sufficient sureties, shall first be bound unto the party for whom such

In what cases
bail is to be
given in error
or execution
may issue.

(b) 8 East, 241.
applies to ob-
ligations for
payment of
money only.

judgment is given, by recognizance to be acknowledged in the same court, "in double the sum adjudged to be re-
"covered by the said former judgment, to prosecute the
"said writ of error with effect; and also to satisfy and
"pay (if the said judgment be affirmed) all and singular
"the debts, damages, and costs adjudged upon the for-
"mer judgment: and all costs and damages to be also
"awarded upon the delaying of execution." See stat.
19 Geo. 3. c. 70. as to inferior courts of record. (a)

A writ of error upon a judgment in debt upon recogni-
zance of bail is a stay of execution, without bail being put
in. 8 East, 240. *Dell v. Wild*, not being within the stat.
of 3 Jac. 1. c. 8.

Extends to
judgment by
default.

This statute extends to all manner of judgments by de-
fault, upon demurrer or nul tiel record, in the above-
mentioned actions.

Cannot ren-
der.

By the nature of this recognizance the bail cannot ren-
der to prison the plaintiff in error in discharge of them-
selves, though he become a bankrupt, nor are they en-
titled to relief. 1 Term Rep. 624. *Southcote v. Braith-
waite*.

Where bail in error was put in vacation and excepted
to, the plaintiff in error gave notice that they would
justify on the first day of next term, and before that day
non-prossed his own writ of error, and the bail did not
justify: held that the bail were not entitled to stay pro-
ceedings in an action against them upon the recognizance,
nor have an exoneretur enter on the bail-piece. *Dickenson,
executrix of Hunt, v. Heseltine, 2 Maule and Selw. 210.*

Bail in error are not chargeable, in an action upon the
recognizance, with mesne profits, where they have not
been ascertained by writ of inquiry pursuant to 16 & 17
Car. 2. c. 8.

No execution
to be staid on
2 Ed. 6. unless
bail; nor ac-
tion on the
case, &c.

No execution shall be staid in any of the courts of
Westminster, &c. upon any writ of error, after verdict
and judgment in any action of debt on the statute of
2 Edw. 6. for not setting forth of tithes; nor in any action
upon the case upon any promise of payment of money,
actions for trover, covenant, detinue, and trespass, unless

(a) See rules 23 Eliz. & M. 6 & 7 Eliz. where the error
ought to be shewn unto the justices of the Bench.

such recognizance shall be first acknowledged. 13 Car. 2. s. 9.

Sect. 11. provides, That it shall not extend to actions popular, or on penal statutes, indictments, &c. other than the statute of *Ed. 6.* Does not extend to popular actions.

By 16 & 17 Car. 2. c. 8. s. 3. (made perpetual by stat. 22 & 23 Car. 2. c. 4.) "No execution shall be staid after verdict and judgment in any personal action whatsoever, unless a recognizance be entered into according to the 3 Jac. 1. c. 8." No execution to stay after verdict, in any action personal, unless bail.

This does not extend to any writ of error to be brought by any executor, &c. nor to any action popular or penal (except debt for tithes.) Sect. 5. Not to extend to executors.

That in writs of error on any judgment after verdict, in dower, or *ejectione firmæ*, no execution shall be staid, unless the plaintiff shall be bound in such reasonable sum as the court shall think fit; with condition, that if judgment shall be affirmed, or the writ be discontinued, in default of the plaintiff therein; or that the said plaintiff be nonsuit, that then the plaintiff shall "pay such costs, damages, and sums of money, as shall be awarded after such judgment affirmed, discontinuance or nonsuit had;" and the court shall issue a writ to inquire as well of the mesne profits, as of the damages by any waste committed, after the first judgment in dower, or in *ejectione firmæ*; and upon the return thereof, judgment shall be given, and execution awarded for such mesne profits, and damages, and also for costs. s. 3. (a) In dower and ejectment, bail to be given by plaintiff himself. Court shall issue a writ to inquire, &c.

A recognizance in error in ejectment ought to be in double the improved rent, and single amount of costs of ejectment. Vide 4 Burr. 2501. 8 East, 298. Barnes, 103. and double costs. *Ibid.* Two years value.

The defendant may give two sufficient sureties if he please in ejectment. Two sureties, if he please.

The same persons who were bail in this court, may justify again upon a writ of error in parliament. *Martin v. Justice*, 8 Term Rep. 369. The case of 1 Str. 527. only means, that bail must justify again upon the new writ of error. So *Salk. 97. 2 Ld. Ray. 840.* Same persons who were bail below may be again bail.

(a) Cannot examine the plaintiff in error as to his sufficiency. 8 East, 299. *Keene v. Deardon.* An infant or feme covert must find bail. *Ibid.*

Does not extend to error coram nobis.

Executors where the judgment is *de bonis propriis*, must put in bail.

In error on judgment in debt on bond, bail bound in the sum recovered, it being double the sum due.

What bonds that require bail.

Bonds that require no bail.

Bond for another's debt.

When not requisite.

The statutes requiring bail in error, do not extend to the writ of error *de coram nobis*. 2 *Crompt.* 394.

If judgment be against an executor or administrator *de bonis propriis*, and he brings error, he must put in bail and pay costs on affirmance; but if judgment be *de bonis testatoris* only, he shall neither put in bail nor pay costs. 1 *Lev.* 245. 1 *Sid.* 368.

On a judgment in debt on a bond in the penalty of 1470l. it was moved to justify bail, each in 1470l. on the other side it was insisted, that the bail ought each of them to justify in double the sum the judgment was given for. But *per Curiam*---The sum recovered is double the debt really due: and it is sufficient for the bail to justify in 1470l. 1 *Wils.* 213. *Moore v. Lynch.*

There must be bail on a bottomry bond, *Str.* 476.; on a second writ of error, *Ibid.* 527.; also on a bond given for the payment of 500l. being the sum mentioned in certain indentures, *Ibid.* 959. on bond for 300l. mentioned in a surrender of a copyhold, by way of mortgage, where judgment had passed by default, *Barnes*, 78; upon a bond conditioned to pay so much as I shall appoint, 1 *Lev.* 117. A bond given by A. to B. to pay a sum certain (the debt of C.) by instalments, the last whereof is still future, is an obligation for payment of money only, and within the stat. 2 *Burr.* 746. *Chauvet v. Alfray.*

But not on a bond for the performance of covenants, though for the payment of money also, *Barnes*, 72: 10 *East*, 407. nor if conditioned to pay for so much beer as should be delivered to S. not exceeding 100l. after judgment upon demurrer, *Str.* 1190. 1 *Wils.* 19.; nor upon a bond for performance of an award, nor on an obligation to indemnify; agreed by counsel on both sides. *Com. Rep.* 322. 2 *East*, 359. 7 *T. R.* 449.

Error on a bond, conditioned that W. G. was bound with the defendant, for his debt, by bond of the same date, to pay 51l. 10s. to *Lat. Ridley*, 30th October, in discharge of the recited obligation; it was held that bail ought to be given. *Comyn's Rep.* 321. *Huddy & us v. Gifford.*

Bail is not requisite on bringing a writ of error on judgment in an action of debt, founded on a prior judgment. 3 *Burr.* 1545. *Biddleston v. Whytel.* Nor on judgment in an action of debt, upon a recognizance of bail in error. *Ibid.* 1565. It does not appear that this was determined. See 8 *East*, 240.

Nor in an action of debt for goods sold and delivered, Nor in debt
and an account stated. 7 Term Rep. 449. *Alexander v.* for goods sold.
Miss. See *Yelverton*, 227. 2 *Bulstr.* 53.

Nor in debt on a count on a promissory note. *Frier v.* Nor in debt
Wridgman, 2 East, 359. And if there be one count, in the on a promissory
declaration on which judgment is entered upon a cause note.
of action for which debt would not lie at the time of the
at. 3 Jac. 1. no bail in error is required. *Ibid.* 360.
Lord Ellenborough. (a)

The condition of a bond was to convey an estate, on If bond be
whichoyer was craved; but defendant suffered judgment conditioned to
to go by default: on a question whether there should convey an
be bail on the writ of error, the court held that the question estate and
was properly examinable by affidavit, and that judgment by
plaintiff ought to make it appear that the bond was default, no
within 3 Jac. 1.; and on affidavit of the defendant that bail in error.
he bond was conditioned to convey the estate, court
held, that bail was not requisite. *Bennett v. Aylett*,
Trin. 32 Geo. 3.

How to sue out a Writ of Error upon a Judgment in the
King's Bench, by Bill, returnable in the Exchequer-
chamber. (b)

A writ of error, like a sci. fa. is considered as a new
action; and therefore upon bringing it, the defendant in
the original action may change his attorney, without ob-
taining a judge's order for that purpose. 7 T. R. 337.
Batchelor v. Ellis.

To obtain a writ of error make out a præcipe or note
of instructions, containing the names of the plaintiff,
and defendant, in the original action, state the nature of
the action, as case, debt, &c. and the judgment, whether
on verdict or inquiry, and the court in which the cause
is instituted, and take the same to the cursitor of the

(a) But if judgment be affirmed on a writ of error in
K. B. or Exchequer Chamber, new bail must be given
upon bringing error in parliament. 1 *Salk.* 97. 2 *Ld.*
Ray. 840. 7 *Mod.* 121. 1 *Str.* 527.

(b) The writ of error must be made returnable after When to be
judgment given, or not amendable. 2 *Str.* 807. 1 Term returnable.
Rep. 979. *Jacques v. Nixon.*

county, where the venue is laid; also take the declaration with you to shew to the cursitor the right names.

Præcipe for writ of error.

Middlesex. Writ of error between *John Brown* plaintiff, and *Charles Denn* defendant, on a judgment in a plea of trespass on the case, (on verdict for the plaintiff, or on inquiry as the case is) given in the court of King's Bench, by bill returnable in the Exchequer-chamber.

J. K. attorney.

A new attorney may do this.

The defendant in the original action, need not obtain a judge's order to change his attorney, on bringing a writ of error. *Batchelor v. Ellis*, 7 Term Rep. 337.

As to getting sealed.

The cursitor will make out the writ, and seal it at the next seal, or if you are pressed for time, he will seal it at a private seal. Pay for writ of error at a general seal 1l. 10s. 6d. and 8s. 6d. more by private seal; when sealed, then take it to Mr. *Smith's* office at Lord *Ellenborough's* chambers, who will allow same, pay him 2l. He makes out the allowance thus, Between *John Brown* and *Charles Denn*; Case. I have allowed a writ of error in this cause, this day of 1812. —

Allowance.

Clerk of the errors. Make an exact copy of it, and serve same on the plaintiff's attorney in the original action, and at the same time shew him the original, and from that time it is a supersedeas of all proceedings in the original action, provided it be regularly proceeded in.

When writ of error returnable in Exchequer shall be delivered to the clerk of the errors.

Ordered, that writs of error, returnable before the justices of the Common Bench and the barons of the Exchequer-chamber, shall without delay be delivered to the clerk of the errors for the time being; and that no person shall be found to forbear suing out execution, on pretence of any such writ of error, before the writ shall be delivered to the clerk of the errors. R. E. 36 Car. 2.

When a Supersedeas.

If sued before final judgment signed as supersedeas.

A writ of error sued out before final judgment signed, continues in force during the whole term in which it is returnable. 5 East, 145. *Somerville v. White*, 1 N. R. 298. And if final judgment be signed at any time during that term; it is a supersedeas, or a stay of execution from the time of signing it, 1 Str. 362. provided bail is put in (when requisite) *within four clear days after final judgment is signed*. And the court have gone so far, that if a writ of error be sued out and allowed, and the plaintiff do not sign final judgment till a subsequent

term after the return of the writ, and then take out execution in order to avoid the effect of it, they would set it aside. *Howston v. Howston*, T. 28 Geo. 3.

After final judgment signed, and before execution issued, this writ is, generally speaking, a supersedeas of execution from the time of its allowance, (provided bail be put in in due time.) But in order to bring the attorney into contempt for proceeding after allowance, he must have had actual notice of it. 1 *Burr.* 340. 1 *Term Rep.* 280. and the allowance is notice of itself, *ib.* Tidd, 1045.

And a writ of error is so absolutely a supersedeas, that after it is allowed the plaintiff cannot take out a *ca. sa.* against the principal, and get it returned *non est inventus*, in order to proceed against the bail. 2 *Str.* 867. Nor if the *ca. sa.* be sued out before, can the plaintiff call for return after the allowance of a writ of error. 1 *East*, 662. even though it has previously lain four days in the office. 3 *Term Rep.* 390. So absolutely a supersedeas after allowed, that a *ca. sa.* cannot be taken out, nor call for a return.

An execution being an entire thing, cannot be superceded after it is once begun; therefore if execution be executed before a writ of error allowed or notice, it may be returned afterwards. But so long as it is executable, but not executed, the allowance of a writ of error is a supersedeas, but not afterwards. 1 *Salk.* 321. After execution once executed, it cannot be superceded.

In cases where special bail is required on writs of error, if it is ordered, that unless the plaintiff upon such writ of error shall, within four days after the delivery thereof to the clerk of the errors, put in bail according to law, the defendant may proceed to execution, notwithstanding such writ. R. E. 36 *Car.* 2. Vide E. 16 *Car.* 2. Bail to be put in within four days.

Cases.

Judgment signed 30th *April*, plaintiff sued out a *fi. fa.* of *May*, a writ of error was allowed and served on the agent, and on the under-sheriff the 5th *May*; the sheriff entered the same day, but after the service of the allowance; no bail in error was put in. Rule why *fi. fa.* executed, should not be set aside for irregularity. *Ashurst, J.* If the writ of error had been followed up immediately by the plaintiff in error regularly putting in bail, it would have operated as a supersedeas; but no bail having been put in, the writ of error became a nullity, therefore no foundation for the application. *Lane v. Bacchus*, 2 *Term Rep.* 45. Rule discharged. When it is a supersedeas.

Bail to be put in within four days after final judgment signed without reference to the time of allowance or serving copy; and may sue it before final judgment signed.

On 25th May, a verdict was given for the plaintiff; a writ of error was allowed on the 31st. The same day a copy of allowance was served; final judgment was not signed till the 14th of June, and execution issued same day; within four days after which, bail was put in. The question was, if the allowance and service was a supersedeas? and on motion to set aside the execution, *Bul-ler, J.* said:—As to the practice which has obtained in suing out a writ of error before judgment signed, it happens in almost all cases that the writ is sued out before judgment is actually signed; because otherwise execution would issue instantly: and the court have gone so far, that if a writ of error is sued out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set it aside. The allowance of a writ of error, in the general course of practice, is not served till final judgment is actually signed: and the words of the rule apply to that. The rule requires bail to be put in within four days after the allowance, but there is no opportunity of putting in bail before judgment is signed. As to the defendant being too soon in serving the copy of the allowance, it makes no difference, for it only operates as an allowance from the time of signing judgment. The service of the allowance is only material to bring the party into contempt, if he proceeds to sue out execution afterwards; for the allowance of the writ of error is of itself a supersedeas. Rule absolute. 1 *Term Rep.* 279. *Jacques v. Nixon*. The same point resolved; *Somerville v. White*, 5 *East*, 145. See *Barnes*, 196. *Warwick v. Trigg*, S. P. The precaution of suing out the writ of error before final judgment signed, was sometimes necessary. For where the judgment was for a large sum, a plaintiff would sometimes sue out execution immediately afterwards, without waiting to have his costs taxed, and before a writ of error could be sued out to stay him, if it were not sued out before. *Ibid*, 146. (a)

What is necessary to make error a supersedeas.

Two things are requisite to make a writ of error a supersedeas of execution, viz. the allowance, and putting in bail.

(a) The defendant may compel the plaintiff by a judge's summons to sign his judgment.

If the writ be allowed before judgment signed, the time for putting in bail is four days after it is signed; 6 *T. R.* 121. If after judgment, four days from the time of the allowance of the writ of error. As to time for putting in bail.

Motion to set aside a *fi. fa.* for irregularity, the judgment was signed on the *Monday*, and the execution taken out the *Friday* following, error was brought, and the question was, how many days the defendant had to put in bail on the writ? Court said, he had four clear days, and plaintiff was not entitled to sue out execution till the *Saturday*. Rule absolute. *Bennett v. Nicholls*, 4 *Term Rep.* 121. Four clear days after judgment to put in bail.

But it is said, if execution be *after* writ of error allowed, without notice of it, yet restitution shall be granted. 3 *Lev.* 312. 1 *Salk.* 321, 322. After allowance.

Where the defendant on being served with process, declared to the plaintiff's attorney that he could not pay; that it was useless to go on with the action, as he would delay all he could, and when he had got judgment, would bring a writ of error, and put it off all in his power; and afterwards brought a writ of error, and on plaintiff's proceeding to execution requested him to keep it secret, and acknowledged that he had shewn him lenity, and requested that he might pay the money by instalments: held that the defendant had admitted, that the writ of error was for delay, so as to prevent its being a supersedeas. *Hawkins v. Snuggs*, 2 *Macle and Selw.* 476.

How to put in Bail

It is necessary to observe that after a writ of error is brought and allowed, that the original names of the plaintiff and defendant in the action are continued in the notice of bail, notice of exception, the rule for better bail, and the rule to certify, until the transcript of the record is carried over, and filed in the Exchequer-chamber, then the names are reversed, and for the first time it is named in that rule *Roe v. Doe*. How to put in bail.

Therefore if there is to be special bail put in, the original names of the plaintiff and defendant still stand, and the notice is intituled, In error, *Doe v. Roe*, and so the notice of justification.

In my former editions I have made the mistake by

making it *Roe v. Doe*, and the error has been from ancient books.

Enter the names of the original plaintiff and defendant, with the names and additions of the bail, on a piece of paper, and attend the clerk of the errors with same, who will enter the same in his bail-book; and appoin him to meet you at the judge's house or chambers for the purpose; bring the bail, and then he will take the recognizance; pay him at chambers 11. 6s. at *Westminster* 3s. 4d. more; notice must be given to plaintiff's attorney of their being put in, pursuant to the following rule.

Notice of bail
to be given.

Ordered, that every attorney of this court, who hath sued out any writ of error to reverse any judgment obtained in this court, in which special bail ought to be put in, after the putting in of such special bail, shall give notice thereof without delay, to the defendant in the writ of error, or to his attorney. R. M. 5 W. & M.

In error.

Doe v. Roe.

Notice of bail.

Cannot be
taken before a
commissioner.

Take notice, that special bail was this day put in upon the writ of error brought in this cause, with the clerk of the errors, before the honourable Mr. Justice——(a) at his chambers in *Serjeant's-Inn, Chancery-lane, London*, and their names are J. K. of, &c. chymist, and G. H. of, &c. baker. Dated, &c. Yours, &c.

G. H. attorney for defendant.

To Mr. A. K. attorney for the plaintiff.

It seems court will not grant time to perfect bail in error, unless real error can be suggested. 2 *Wils.* 114.

The original names are continued in error until the transcript is carried over.

Where the plaintiff in error within four days after being ruled, put in better bail, viz. on the day after Hilary term gave notice that he should justify the same bail on the first day of the ensuing term, and two days before the first day of that term, gave notice of fresh bail: held that the latter bail were not entitled to justify, there being no reason assigned for the non-appearance of the former bail. *Lunn v. Leonard*, 1 *Maule and Selw.* 366.

(a) The same bail who were in the original action, may become bail in error, if they are able to justify. 8 *Term Rep.* 639. *Martin v. Justice.*

Where the plaintiff in error, was ruled in vacation to put in better bail, and took no notice of it until four days before the next term, when he gave notice of added bail for the first day of the term, the court would not permit the bail to justify. *Ostrich and another v. Wilson*, 1 *Maule and Selw.* 367. *n. a.*

Of excepting to the Bail.

If the bail are not approved of, the plaintiff in the original action may have a rule for better bail, which is obtained at the clerk of the errors, pay 2s.; serve a copy, and if the bail do not justify, or better bail be put in within four days after notice of the rule, he may take out execution; as the bail are considered as a nullity. *1 East*, 580. But the writ of error still remains, and the defendant in the original action may proceed on his writ of error to reverse the judgment notwithstanding. *1 East*, 580. *2 Ld. Ray.* 840.

Doc. 2 Unless the plaintiff in the writs of error, puts in better bail, within four days next after notice thereof given to the said plaintiff, or his attorney, execution will issue. *Roe.* § Clerk of the errors.

If bail in error be excepted to, and do not justify within the time allowed by the rule, still they remain as bail till they be exonerated; and if any proceedings be taken against them, (although they be considered as no bail,) they will not be exonerated without payment of costs. *Fould v. Holmstrong*, 7 *East*, 582. But if others had been put in and justified, I conceive in that case, it would have been otherwise.

If the defendant in error do not except to the bail for insufficiency thereof within twenty days next after notice hereof given to him or his attorney, then such recognizance shall be allowed. *R. M. 5 W. & M.*

If a rule for better bail be served in vacation, you have no occasion to justify, until the next term; because bail can never be perfected but in open court, unless now by stat. on mesne process.

The same notice is allowed to justify in error, as in common cases, viz. if they be the same bail as were put in to justify, then *Monday* for *Tuesday* will do: if added bail, then two days exclusive; and the common notice for justification will do; bespeak the book of the clerk of the errors, to go to *Westminster*; make affidavit of the

How excepted to be entered.

Rule for better bail.

Bail in error though they do not justify, are liable to costs if they are not exonerated before proceedings against them.

Within what time to be excepted to.

When to justify.

The same notice to justify as in other cases.

service; give counsel brief to move to justify, 10s. 6d. clerk of the errors 10s.; officers of the court 9s. 6d. Rule for allowance of the bail must be drawn up at the clerk of the rules, and served. (a) And you may add bail and justify same as on mesne process by giving notice.

Of the Rule to certify Record.

Rule to certify record.
Caa. Temp.
Hard. 362.

The bail being complete, search when the writ of error is returnable (if no bail is required.) This step is the first that defendant's attorney in error takes; if it is returnable in the same term the allowance is made, then proceed by giving a rule (which you get at Mr. Smith's office) for the plaintiff in error to certify the record, which rule expires in eight days after service; pay for it 2s. serve attorney with a copy.

In the Exchequer-chamber.

Rule to certify.

Doe } Unless the plaintiff in the writ of error certifies the record, within eight days next after notice hereof given to the said plaintiff or his attorney, a nonsuit will be entered. Clerk of the errors.

After service with whom proceedings are to be left.

If you do not examine it in term, you pay for the keys of the treasury 6s. 10d. extra.

After service of this rule, the plaintiff's attorney in the original action, leaves a copy of all the proceedings from the declaration to final judgment, with Mr. Smith, the clerk of the errors, who sends to the attorney for the defendant in the original action, for the transcript money, which being paid, he proceeds to make a transcript on rolls of the proceedings to final judgment: when done the attorney for the plaintiff in the original action obtains it from him, and takes it to Mr. Edge at the treasury. *Westminster-hall*, and examines the same with the original roll carried in, where it is left for the bag-bearer to return it to Mr. Smith again to be filed in the Exchequer chamber.

If the transcript money be not paid.

But if the transcript money be not paid on the expiration of the rule, the plaintiff's attorney in the original action, may make an affidavit of the service of the rule to certify, and take same to Mr. Smith, who will sign a non-

(a) If the bail do not justify, but others do in their stead, their names may be struck out of the recognizance. 1 *Wils.* 337. *Jones v. Tubb*; but the court must be moved for this purpose.

pros, which enables the plaintiff in the original action, to take out execution for the sum for which the judgment is recovered and the costs taxed thereon. But in this case the stat. 3 H. 7. c. 10. gives no costs in error. *Salt, one, &c. v. Richards, 7 East, 111.* But you may still proceed on the writ of error to obtain the costs.

N. B. In case the plaintiff's attorney has not filed a bill to warrant his proceedings, it should now be done, and of the term the declaration is of (in case the judgment be by default or on inquiry.) If there be a verdict, it is unnecessary, as the want of a bill cannot be assigned for error.

To file the bill.

Until the transcript of the record is carried over to the Exchequer-chamber, all the proceedings hitherto mentioned are in the court of King's Bench; but when the transcript is delivered over to Mr. *Smith*, the clerk of the errors in the Exchequer-chamber, they are then in the court above to which they are removed.

Till the transcript is carried over all proceedings remain in court below.

The defendant in error cannot transcribe the record. 1 *Wils.* 35. he must nonpros the suit.

Of Amendment after Judgment if Error brought.

When the transcript is returned and filed, the plaintiff in error may move to amend the writ of error, or the defendant in error may move to quash it, or it may abate, or be discontinued.

By stat. 5 Geo. 1. c. 13. all writs of error wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective courts, where such writ or writs of error shall be made returnable.

It seems no costs are to be paid on any amendment. *Fitzgib.* 201. 1 *Str.* 683. 2 *Str.* 392. *Com.* 425. No costs.

A fault in the writ of error was amended without. 2 *Str.* 865. So by striking out a plaintiff. *Ibid.*, 392. The court may, when cause in the paper, amend *ex officio*. *Ibid.*, 302. *Ld. Ray.* 1587. *Barnard.* 462.

In an action against two, one found not guilty, the other had a verdict against him; the latter brought error in the name of both. Motion to quash it, motion at same time to amend by striking out the name of defendant, found not guilty; both rules came on together, and

Action against two, one found not guilty, the other guilty; error brought in names of

both, court ordered writ to be amended.

Mistake in the name of defendant in error.

court ordered the amendment, and discharged the writ to quash. *Verelst, Esq. & an. v. Rafail, Corp. Rep. 421*

A mistake in the name of the defendant in error, who issued execution, this court granted a rule to shew cause why the sheriff should not pay the money levied on the execution into court, and enlarged that rule, in order to allow the plaintiff in error to amend his writ. *2 Smith R. 259.*

No amendment if error returned before giving judgment.

But where writ of error was returnable before the giving of the judgment, on which it was brought, court held this not to be amendable by the statute. *2 Stra. 607. Wright v. Canning, 2 Ld. Ray. 1531.*

Of quashing Error.

The general ground of quashing a writ of error, is some fault or defect therein, that is not amendable by stat. 5 Geo. 1. c. 13. and it seems the application ought to be made to the Exchequer-chamber wherein it is returnable, but it cannot be quashed in this court. *Lloyd v. Skutt, Dougl. 352.* see the note.

Costs are allowed on quashing the writ.

By stat. 4 Ann. c. 16. s. 25. Upon quashing any writ of error for variance from the original record, or other defect, the defendant in such error, shall recover against plaintiff his costs, as he should have had, if the judgment had been affirmed, and in the same manner.

This statute is not confined to those cases only, when a variance from the original record was assigned as error: but extends to all writs of error by reason of the words in the statute or other defect.

¹ Wils. 88. S. P.

² Ld. Raym. 1403.

It seems a writ of error may be quashed being brought by one defendant only, of a judgment against two, and laid to the damage of one. *Brewer v. Turner, 1 Str. 233. 8 Mod. 305. 5 Mod. 338. Salk. 319. 2 Str. 1110.* by this court; and costs are given. *Str. 606. 8 Mod. 305.* It is said, a writ of error cannot be quashed till the transcript is returned and filed. *Ld. Ray. 329.*

But will not quash it if brought on a *qui tam* action returnable in Exchequer.

But where a writ of error was brought on the statute of usury, returnable in the Exchequer-chamber; the court held, that this application ought to be made to the court of Chancery, or to the Exchequer-chamber, where it is returnable. *Lloyd qui tam v. Skutt, Dougl. 352.* And there it is said, on application to the Chancery, that court refused to entertain the question, but the court of Exchequer held that the writ of error lies to that court.

If the writ of error be returnable before judgment signed it is good. 5 *East*, 145. If return before judgment.

The court on motion will not quash a writ of error, though brought twenty-nine years after the judgment, for this would be to deprive the party of the benefit of replying the exceptions in the statute. 2 *Str.* 837. If brought after 29 years.

A writ of error having been quashed because brought by a feme covert without her husband, the defendant in error is entitled to costs under stat. 4 *Ann. M'Namara v. Fisher*, 8 *Term Rep.* 302. Error by feme covert without husband joining.

See 1 *Str.* 139. 2 *Str.* 834. *Barn.* 270. where not liable to costs. Also see further on when the writ abates.

On a writ of error, the King's Bench sends only the manuscript to the Exchequer-chamber, and therefore the transcript must be brought back to the King's Bench to be amended by the original record. *Str.* 837. *Rutter v. Redstone*. The King's Bench only sends a transcript.

If there be any mistake of the clerk made in the transcript, the court above will order the transcript to be amended by it. *Hard.* 505. see 1 *Wils.* 337. Mistake of the clerk in transcript.

As to an inferior court, costs are to be paid on amendment, provided the plaintiff proceed no further. 2 *Ld. Raym.* 897. *Barn.* 17. But if amendment be made after verdict by virtue of the statute of jeofails, no costs are given. *Cas. temp. Hard.* 314. The postea may be amended by the judge's notes after final judgment and error brought. 3 *Term Rep.* 749. So where damages are given for a greater sum than laid, and error brought, court will permit plaintiff to enter a *remittitur*, on payment of costs of the writ of error. 1 *H. Black. Rep.* 643. So where defendant pleaded the general issue, and statute of limitations, a verdict was found for plaintiff on the first issue, and no notice taken of the last; after error brought, and joinder (which was assigned on this point,) court allowed it to be amended, on payment of costs. 3 *Term Rep.* 659. *Petrie v. Hannay*. Vide another amendment, 349. So a judgment may be amended by changing it from *de bonis propriis*, to *de bonis testatoris ei*, &c. after error brought. *Short v. Coffin*, 3 *Burr.* 2730. *Dougl.* 116. cited. So the name of the plaintiff's attorney in the warrant on the roll, so as to make it correspond with that of the declaration after error brought, and assigned for error. *Richards v. Brown*, 116. See *Barnes*, 18. 7 *Salk.* 51. 1 *Str.* 786. Costs on amendment.

Of the Action on the Judgment pending Error.

If the plaintiff brings an action in the judgment pending a writ of error, and he has obtained judgment for want of a plea and execution on it, the court will on application stay the proceedings, as it would be unreasonable that the plaintiff should proceed in execution of a judgment which would of course fall to the ground, in case the original judgment upon which it was founded, should be reversed, and restrain also the defendant from bringing a bill in equity. *Taswell v. Stone*, 4 Burr. 2454.

To stay proceedings in action on judgment, bail must first be put in and perfected.

In an action on the judgment pending error, the court held, that the defendant was not in a situation to make any application to stay the proceedings in the action until he had put in bail. *Smith v. Shepherd*, 5 Term Rep. 9. Determined in *Bicknell v. Longstaffe*, 6 Term Rep. 455. that he must perfect his bail first.

Acknowledgment of error brought for delay.

On motion to stay proceedings pending error, it was sworn that defendant had acknowledged that the writ of error which had been depending two years was for delay. Court ordered, that upon the defendant's confessing judgment in this action, and undertaking to bring no writ of error thereon, execution should be staid till the determination of the writ of error. And court said, that they could not make him undertake to waive his right in that respect. *Gribble v. Abbot*, *Comp. Rep.* 72.

Pending second writ of error, action on the judgment.

Error on a judgment, in C. P. afterwards error in parliament, they nonprossed the first writ of error, and motion to stay the proceedings in an action on the judgment pending the second writ. *Buller, J.*—It appears by the defendant's own conduct, that the writ of error has been sued out without any foundation for it. Rule discharged with costs. *Entwistle v. Shepherd*, 2 Term Rep. 78.

On death of plaintiff before affirmation, court will refuse the judgment to be entered nunc pro tunc.

Where an action is brought on a judgment recovered in the King's Bench, and after judgment, the defendant brings error, and obtains a rule to stay proceedings in the mean time, and the plaintiff dies before judgment affirmed, the court will not permit judgment to be entered *nunc pro tunc*. *Bates v. Lockwood*, 1 Term Rep. 637.

If a second action be brought on the judgment.

If the defendant bring a writ of error in an action on the judgment, and plaintiff brings another action on the judgment, and recovers, he cannot sue out execution on

the second judgment, till the writ of error be determined.
Bensell v. Black, 3 Term Rep. 643.

Of alleging Diminution.

After the transcript is examined and delivered over to Mr. Smith, the defendant's attorney in error applies to him for a rule to allege diminution, which is to be done in eight days after service, or a nonsuit may be entered; pay 8d. per folio, and 2s. 4d. for rule; serve a copy on the plaintiff's attorney, who must call at Mr. Smith's office, and pay the sum demanded; if not, he will require affidavit of the service of the rule to be tendered to him before he signs a nonsuit (provided the attorney for the defendant in error insists on a nonsuit before he sends to the plaintiff's attorney); but if he sends, and there is no answer the next morning, he will sign a nonsuit and tax the costs.

After made up and examined to be delivered over to clerk of the errors in Exchequer.

Rule to allege diminution.

In the Exchequer-chamber,

Roe v. Doe. { Unless the plaintiff in the writ of error alleges diminution, within eight days next after notice hereof given to the said plaintiff, or his attorney, a nonsuit will be entered: *Smith*, clerk of the errors.

Rule to allege diminution. The names of the parties are now reversed.

(a) Formerly a writ of diminution issued, which was not an original writ, but if issued out of the court of error to allege diminution, if the whole record is not certified, or not truly certified, the party injured may allege diminution of the record, and cause it to be rectified. But no diminution can be alleged on records out of inferior courts, *Sid.* 40. 7 *Mod.* 103. except Wales and county palatine, 1 *Salk.* 206. But the court may award a *certiorari ad informandum conscientiam*. Errors cannot be entered until the *certiorari* of diminution alleged, and the rule to assign errors is out.

If the writ of error be returnable the first day of term, the plaintiff in error is to transcribe the same term, allege diminution the term following, assign errors the next day of term, when to transcribe.

(a) Diminution is either of the body of the record or of its out-branches, as of the original writ, warrant of attorney, &c. and after alleged, a *certiorari* issues to certify all the record.

term, and argue them the fourth term, provided the several rules are taken out and served without loss of time.

Rule to assign Errors.

Rule to assign errors. If the plaintiff in error alleges diminution, then in the next term get a rule from Mr. *Smith* to assign errors (pay 2s. 4d.) which expires in eight days next after service. Serve plaintiff's attorney with a copy. The common errors, which are best and cheapest, are entered by Mr. *Smith*, pay him 8s. counsel's signature is not necessary. But if special errors are assigned, then the assignment is drawn and signed by counsel, fee 10s. 6d. ingross same on a 4d. stamp paper, and file it with Mr. *Smith*, pay 8s. who will give an office copy to the attorney for the defendant in error.—The defendant's attorney in error will then draw the joinder, and get counsel to sign same, which also is filed with Mr. *Smith*, on a 4d. stamp paper, and file it with Mr. Poole.

Counsel's hand not necessary.
If special errors, contra.
Joinder.

In the Exchequer-chamber.

Rule to assign errors. *Roe* } Unless the plaintiff in the writ of error as-
v. } signs error or errors, within eight days next
Doe. } after notice hereof, given to the said plaintiff or
his attorney, a nonsuit will be entered.

Clerk of the errors.

If the plaintiff in error within the time limited by the rule do not assign errors, the defendant may apply to Mr. *Smith*, and he will sign a nonpros, and tax the costs, then execution may issue.

Assignment of Errors.

In nature of a declaration. An assignment of errors is in the nature of a declaration, 2 *Bac. Abr.* 216. and is either of errors in fact, or errors in law.

Errors are common or special. Errors in law are *common*, or *special*. The common errors are, that the declaration is insufficient in law, to maintain the action; and that the judgment was given for the plaintiff instead of the defendant. Special errors are in cases of judgment by default, the want of a bill, or warrant of attorney, or other matter appearing on the face of the record, which shews the judgment to have

een erroneous. The plaintiff may assign several errors in law, but only one error in fact; and he cannot assign error in fact and error in law together. 1 *Str.* 439.

Where there are several plaintiffs in error they must all join in assigning errors, unless some have been summoned and served. If several plaintiffs.

And errors must be assigned in term, and not in vacation. *Sty. Pract. Reg.* 241. After in *nullo est erratum* pleaded, an assignment of general errors shall not be amended. 2 *Mod.* 304.

Error cannot be assigned contrary to the record; if it is judgment must be affirmed. 1 *Wils.* 85. *Bradburn v. Taylor.* 1 *Str.* 684. *Helbret v. Held.* 1 *Roll. Abr.* 758. pl. 8. Cannot assign contrary to record. Where the matter alleged is not by law assignable, there in *nullo est erratum* is a demurrer in law, as the want of an original, or bill after verdict.

If neither plaintiff, nor his attorney, can be found, the court will order, that the rule to assign errors fixed up in the King's Bench office, shall be good notice. *Str.* 417. If neither plaintiff or attorney be found to serve rule. *Leeds v. Power.*

Of the Writ of Certiorari.

In case the plaintiff in error should assign for error (after judgment by default) the want of a bill, he should sue out a certiorari to verify his errors, which is a judicial writ, issuing out of the court, where the writ of error is depending, directed to the chief justice of the court of King's Bench for certifying a bill, which is tested in the name of the chief justice of the court of Common Pleas; and it ought not to bear *teste* before the assignment of errors. It is to be signed by Mr. *Smith* and sealed. If error be assigned on want of a bill, a certiorari issues.

But if the plaintiff's attorney does not make out the *certiorari*, the defendant, in error, may compel him by obtaining a rule for that purpose of Mr. *Smith*, serve a copy on his attorney, and he must within the limited time sue out the *certiorari*, leave it with the clerk of the declarations in the King's Bench office, who will return it with a copy of the bill, which he gets the chief justice to sign, and then it is delivered over to Mr. *Smith*. If the plaintiff in error's attorney does not make out certiorari, how to compel him.

But if no *certiorari* be sued and returned in the time limited by the rule, then you may, by applying to Mr. *Smith*, sign a nonpros, and take out execution.

In case the bill should not be filed before the assign- If the bill be not filed.

ment of errors; and the same is so returned on the *certiorari*, still the defendant in error may file the bill of the term the declaration is of with the clerk of the declarations of the King's Bench, and he may afterwards sue out a writ of *certiorari* in the Exchequer-chamber, which is signed by Mr. Smith, then seal it; leave same with Mr. Maddock, the clerk of the declarations, who will certify the bill, and take same to the chief justice for his return, which is taken away by you and filed with Mr. Smith. The court of King's Bench will not inquire how the bill came there. See 1 *Taunton Rep.* 126. *French v. Cook*. When done you may plead *nullo est erratum*, and the court will when the cause is set down, affirm the judgment. There are many cases in 9 *Viner* 555. to this effect. 2 *Ld. Ray.* 1476. *Com. R.* 118. 1 *Salk.* 267. The court will apply the record to that which is good, and support the judgment.

Can have but one writ of *certiorari*.

The plaintiff in error can have but one writ of *certiorari*. 2 *Str.* 765. *Merrifield v. Berry*. *Bowers v. Mann*, *ib.* 819.

After one *certiorari* must move court for a second.

Ordered that no *certiorari* upon a writ of error, shall be sued out, or made, by an attorney, after a *certiorari* in the same cause hath been already sued out, and returned, without motion in court by counsel. *R. E.* 11 *Car.* 2.

Of what Term the Original is to be.

When all the proceedings are in one and the same term; an original in that term will warrant same; but an original of the term final judgment is given, will not warrant that judgment, if it appear upon the same record that there have been proceedings of a preceding term, as an interlocutory judgment. 1 *Wils.* 181. *Dye v. Sweeting*. It is sufficient if a warrant of attorney be filed at any time pending the suit.

May plead or demur to an assignment of errors.

To an assignment of errors; the defendant may plead or demur. Pleas in error are common, or special. The common plea, or joinder in *nullo est erratum*; or that there is no error in the record or proceedings; which is in the nature of a demurrer, and at once refers the matter of law arising thereon, to the judgment of the court. *Tidd*, 1085.

If error be in the body of the record.

If error be alleged in the body of the record, in *nullo est erratum*, is a good rejoinder, for this shall put the matter in the judgment of the court. 1 *Roll. Abr.* 763.

By pleading *in nullo est erratum*, the defendant in error admits the record to be perfect, and neither party can allege diminution, or pray a *certiorari*, 1 *Salk.* 269. But before or after *in nullo est erratum* pleaded, the court *ex officio* may award a *certiorari*, 1 *Salk.* 269, 270. in order if possible to support the judgment without a *certiorari* being sued, where the want of a bill, original, or warrant of attorney is assigned for error: 2 *Ld. Ray.* 1005. 1 *Salk.* 269. 2 *Str.* 765. 819. 907.

The defendant may plead a release of errors: and such release being in the same instrument with the warrant of attorney, and dated in the term in which judgment is entered, is good. *Str.* 1215. *Landon v. Pickering.* *Show.* 50. 3 *Atk.* 29.

If defendant dies after *in nullo est erratum* pleaded, the court may reverse the judgment, without a new writ of error, for the writ does not abate. *Show.* 186.

The defendant may plead the statute of limitations. *Str.* 1055. B. R. H. 345.

If an error in fact, and an error in law be assigned, the defendant must demur; for this is double. 1 *Lev.* 105. 76. 1 *Roll.* 761. 1. 35. 2 *Str.* 975.

If the defendant dies,
When defendant must demur.

Of arguing the Errors. (a)

The next term, being the fourth, the defendant in error (if general errors are assigned) may plead *in nullo est erratum*, which is done by informing Mr. Smith the first day of the term, or previous thereto, (which is best): he also sets down the cause, pay 9s. 6d. and moves to affirm the judgment. N. B. You may now apply for interest to be added in the Exchequer-chamber, but such application is made by special motion in court. Wait four days after affirmance (exclusive,) then apply to Mr. Smith to tax the costs; pay according to the length of the pleadings; when the costs are taxed, issue out execution, but, before it is returnable, apply to him for the transcript,

Setting down for argument.

(a) If general errors are assigned there can be no argument—Therefore be careful as to this point, if an argument special errors must be assigned. And this court does not award a *scire facias ad audiend. errores*, not having the record before them, but notice is given to the parties concerned. 1 *Vent.* 34.

which take to the King's Bench treasury, and file it with Mr. Edge; pay 2s. 6d.

If real errors are assigned, and are intended for argument.

In case real errors be assigned, and the joinder filed as before stated, and it is meant that there should be an argument, the defendant's attorney in error must then obtain an office copy of the transcript, assignment, and joinder of Mr. Smith, pay him 8d. per sheet; when obtained, make a copy thereof to the end of the joinder, and deliver same to the attorney for the plaintiff in error, then set down the cause with Mr. Smith, pay him 9s. 6d. there is no necessity to move for a concilium. In this case the joinder should be filed in the vacation preceding the fourth term, and the office copy bespoke, so that the paper books may be got ready for the judges according to the following rule, as well as the counsel who are to argue the errors. And the attorney for the plaintiff in error must search if error is set down for argument, with Mr. Smith, as there is no rule in this case to appoint the day.

When copies of error and record are to be delivered to the judges of the Common Pleas, and Exchequer.

It is ordered, that no copy of error and record thereupon be delivered to the justices or barons, before the attorney for the plaintiff upon the writ of error shall give ten days notice to the clerk of errors in the Exchequer-chamber, that the error assigned in the record is to be argued before the said justices and barons, for both parties, and that the attorney for the plaintiff shall deliver four copies to the justices of the Common Pleas, and the attorney for the defendant shall deliver four other copies to the barons of the Exchequer, four days before the hearing the cause. R. E. 33 Car. 2.

How to proceed if cause is to be heard.

If the plaintiff in error does not set them down, the defendant may; if the judgment is affirmed, the costs are taxed by Mr. Smith four days after, exclusive; then set out execution, a bill is necessary for him to tax by.

As to Interest and Costs.

If judges divide equally.

In this court, it is the practice, upon an equal division of the judges, to affirm the judgment. 1 Show. 36. And so is the practice in the House of Lords; but in the King's Bench, if the court are equally divided, there must be a consent of the parties for affirming or reversing the judgment. 1 Str. 379. *Thornby v. Fleetwood*, in order to expedite the determination in the House of Lords.

If damages are not assessed.

Where the damages are not assessed, as when judgment is given on demurrer, the Exchequer-chamber

cannot give a new and complete judgment, but by an interlocutory judgment, *quod recuperet*; and the transcript being remitted, the K. B. will award a writ of inquiry and give final judgment, *Cro. Jac.* 207. *Yelv.* 75. Where a judgment is given against the plaintiff in the King's Bench, on a special verdict, by which the damages are assessed, the Exchequer-chamber may, in case of reversal, give a new and complete judgment, for the plaintiff to recover those damages. 1 *Ld. Ray.* 9, 10. *Carth.* 319. *Skin.* 514.

On a special verdict for plaintiff, if reversed.

The Exchequer-chamber is bound to allow double costs to the defendant in error, on the affirmance of a judgment of the King's Bench; but it is entirely a matter in their discretion whether or not interest shall be allowed on such affirmance. *Shepherd v. Muckreth*, 2 *H. Black. Rep.* 284.

Interest and costs.

It seems the mode at the time of the affirmance, is to let counsel move for a rule to shew cause *why it should not be referred to the clerk of the errors to calculate and ascertain the amount of the interest upon the final judgment, after the rate of 5l. per cent. from the time of final judgment being entered up, until the affirmance of final judgment in this court; and that such interest may be added to the damages for which such final judgment was entered up; the rule is drawn up by Mr. Poole, serve it, make affidavit thereof, and then move to make it absolute.*

The motion.

As to Interest being allowed against Bail in Error.

The plaintiff recovered a judgment in Hilary term, 1784, for 800l. the defendant brought error in the Exchequer-chamber, and put in bail. In Nov. 1785, judgment was affirmed, and an action of debt was brought against the bail in same term, and plaintiff recovered. The bail required indulgence, and granted. The question was, whether the plaintiff was entitled to interest from the bail on the sum recovered between the time of signing the judgment in the King's Bench, and the affirmance in the Exchequer, as interest for the whole time, since the time of signing the final judgment, had been levied against the bail? *Buller, J.*—This is not an application to a court of equity, but to a court of law, to enforce the performance of an engagement which the bail have entered into. The recognizance they entered into is with a condition, that the defendant in the original action shall

In debt upon a recognizance of bail in error in Exchequer Chamber, the bail are not liable to interest between the time of signing judgment below, and the affirmance, but they are liable to interest after the affirmance.

prosecute his writ of error, and that if judgment should be affirmed, they will pay the debt and costs upon the former judgment, together with such costs as are occasioned by the delay. So that the bail in express terms only promise to pay what was due upon the original judgment, and the costs given in the Exchequer-chamber; therefore we are not warranted in giving any more. In *Bodily v. Bellamy*, 2 Burr. 1094. it is laid down, that when final judgment is given by the court, the demand is liquidated, and no interest can be computed after that time. *Wilford v. Davison*, 4 Burr. 2127. it was held, that on affirmance of judgment in error, bail are not liable for more than they have undertaken to pay; namely, the debt and costs which have been adjudged due. As to interest due subsequent to the time of the affirmance, that stands on a different ground; because when the judgment is affirmed, it becomes, from that time, the debt of the bail; and if an action were brought on that judgment, the jury might give damages for the detention of the debt, so as to include interest up to the time of final judgment. *Frith v. Leroux & an.* 2 Term Rep. 57.

Of Reversal.

If the judgment be reversed.

If the judgment be reversed, the party shall be restored to all that he has lost by occasion of the judgment, *Cro. Jac.* 698. and a writ of restitution shall be awarded.

Where plaintiff in the original action has execution and money levied, and after judgment is reversed, defendant shall have restitution.

Where the plaintiff in original action has execution, and the money is levied and paid, and the judgment is afterwards reversed, there the party shall have restitution without a *scire facias*; because it appears on the record that the money is paid, and there is a certainty of what was lost; otherwise where it was levied but not paid, for then there must be a *scire facias*, suggesting the matter of fact, viz. the sum levied, &c. But where judgment is set aside after execution for irregularity, there needs no *scire facias* for restitution, but an attachment shall be granted upon the rule for contempt, if there be not a restitution. *Per Holt, C. J.* 2 Salk. 588. 19 Vin. Ab. 157. See 2 Saund. 101. *Lill. Ent.* 641.

If a lease be sold.

If a lease be taken in execution by *fi. fa.* and sold, and afterwards the judgment is reversed, the restitution must be of the money for which it was sold, and not of the term. *Cro. Jac.* 246. pl. 3.

Of the Days for hearing of Errors in Exchequer.

The Exchequer-chamber is a branch of the court of Exchequer, in which there are no more than two return days in every term: one is called the general affirmance day, being appointed by the judges of the Common Pleas, and barons of the court of Exchequer, to be held a few days after the beginning of every term, for the general affirmance or reversal of judgments. The other is called the adjournment day, which is usually held a day or two before the end of every term; and on the first of these days, judgments are affirmed, or reversed, or writs of error nonprossed. The intent of the latter is, to finish such matters as were left undone at the former; on which last day also (as well as on the first) judgments may be affirmed, or reversed, or writs of error nonprossed, on paying 16s. extraordinary to the clerk of the errors, and setting down the cause for affirmance two days before the adjournment day; the clerk of the errors charging 9s. 6d. for every cause set down for the general affirmance day, and 11. 5s. 6d. for the adjournment day.

If the judgment be affirmed, the court who affirm it, may also give judgment for costs for delay of execution, *Saund. 22. 5: 4 Mod. 127.* and may award execution, *by ca. sa., fi. fa. or elegit,* without a *sci. fa. Cro. Eliz. 107.* If judgment shall be reversed, the record shall be demanded by statute *27 El.* for the Exchequer has no authority but to affirm, or reverse the judgment. *1 Salk. 103.* But if it is upon a special verdict, that court on notion will give final judgment.—So where the plaintiff in error is nonsuited or discontinues. *2 And. 123.* If the judgment is reversed for error, the whole shall be reversed, *1 Salk. 24. Carth. 235.* without costs. *1 Str. 617.*

Afterwards, to wit, on the next after in this same term, comes the said R. C. by J. F. his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said A. B. to have and maintain his aforesaid action thereof against the said R. C. There is also error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said A. B. against the said R. C. Whereas, by the law of the land, the said judgment ought to have

Of the days for hearing causes in Exchequer-chamber.

Of the judgment.

If reversed. 1 B. and P. 30.

Common assignment of errors in the Exchequer-chamber.

been given for the said R. C. against the said A. B. And the said R. C. prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

Joinder.

And hereupon the said A. B. by his attorney, freely comes before the justices of our said lord the king, of the Bench, and the barons of the Exchequer of our said lord the king, of the degree of the coif, in the Exchequer-chamber, at Westminster aforesaid, and says that there is not any error in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the said court of our said lord the king here, may proceed to examine as well the record, and proceedings aforesaid, as the matter aforesaid, above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c. but because, &c.

Writ of Certiorari.

To be ingrossed on a 11. stamp parchment, signed by Mr. Smith, pay 8s. sealing 7d.

George, &c. To our trusty and well-beloved *Edward Lord Ellenborough*, our chief justice assigned to hold pleas in our court before us, greeting: because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in our court before us by bill, between A. H. and J. G. of a plea of trespass on the case, it is said, manifest error hath happened, to the great damage of the said J. as by his complaint we have understood; the record and proceedings of which said judgment we have lately caused to be brought before our justices of our common bench, and our barons of our Exchequer, of the degree of the coif, to correct the errors in the same, according to the form of the statute in such case made and provided, in the chamber of our Exchequer aforesaid; and the said J. appearing in the same Exchequer-chamber hath said, that whereas by the record aforesaid sent to the same justices and barons it appears that the said A. in Trinity term, in the 57th year of the reign of his present majesty, exhibited into the said court of our said lord the king, before the king himself, her bill against the said J. in the plea aforesaid, and that the said J. was in the custody of the marshal of our Marshalsea before us; nevertheless the said J. at or before the time of exhibiting the bill of the said A. was not in the custody of the marshal of our Marshalsea before us;

neither was any bail ever filed for him in the said court; nor any such bill, and the continuances thereon, indorsed in our said court, of the same term, before us of record remaining; and that whereas by the record aforesaid so as aforesaid sent, it also appears that the said A. constituted one R. F. her attorney against the said J. in the plea aforesaid; nevertheless the said J. hath said that he said R. F. had no warrant of attorney thereon on record filed; and we being willing to be certified of the premises aforesaid, in this behalf, command you that the files of the bails of the county of *Middlesex*, and of the bills of the said Easter term in the 57th year aforesaid, in your custody, and also the rolls and other memorandums of the warrants of attorney of the same term, in your custody of record likewise remaining, being searched, what of the said bill, bail, and warrant of attorney aforesaid, you shall find, to our justices and barons aforesaid immediately into the chamber of our Exchequer aforesaid, you certify, together with this writ. Witness, Sir *James Mansfield*, knight, &c.

N. B. Writs issuing out of the Exchequer-chamber are always witnessed by the chief justice of the Common Pleas.

The like writ will issue where there is the want of an original assigned for error.

Error from the Common Pleas into the King's Bench.

The method of proceeding to obtain this writ is particularly stated in my *Instructor Clericalis* in the Common Pleas, from p. 756, fifth edition, as far as the delivering over the transcript to the court of King's Bench.

Although eight days are mentioned in the rule to transcribe, it is the duty of the officer to transcribe sooner if he can; and as soon as the record is brought into court, the defendant in error may proceed upon it. *Sambridge v. Housley*, 2 Term Rep. 17. And if the record is brought in the vacation, it is a record of the preceding term.

No curitor shall make any original writs of any return past, unless he receive instructions within the term wherein they are to be returnable, or at farthest on or before the *essoign* day of the next succeeding term, without warrant from the lord chancellor or master of the rolls. *Lord Clarendon's* order in Chancery.

The proceedings shall not be staid, because the chief justice has not signed the return. *Str.* 1063. *Blackwood v. South Sea Company*.

Original to be bespoken before the *essoign* day of the succeeding term.

It is the better way not to docket the judgment roll, as the transcript must be examined by it, and will save going to *Westminster-hall* to examine it there. But it should be docketed previous to the delivery over of the transcript,

How to proceed after Transcript filed. (a)

The transcript being complete and examined with the roll, it is delivered over by Mr. *Hough* (who is very expeditious in these cases) with the writ of error annexed to Messrs. *Provost and Chambre*, in order for the parties to take copies if they think proper; but it is necessary for the defendant in error to bespeak his at the time of signing the writ, as he will want it in the future stage of the business. The transcript being filed, the cause is then in the court of King's Bench. This then warrants the defendant in error to take proper steps to obtain his execution. Therefore the next step is to sue out a writ of *scire facias quare executionem non*, calling on the plaintiff to shew cause why execution should not be adjudged to the defendant in error.

The clerk of the errors in Common Pleas, in transcribing the record by mistake entitled it generally instead of specially, error was assigned thereon, after which he amended the transcript, by inserting the special memorandum; they would not restore the transcript to the state in which it stood at the time the plaintiff in error assigned his error. *Randoll v. Bailey and another*, in error, 1 *Maule and Selw.* 232.

Means of compelling assignment.

This writ is now considered merely as a means of compelling an assignment of errors, and no plea by the plaintiff in error thereto, will be admitted. 1 *Str.* 679. *Parker v. Stanton*, 391. *ib.* 2 *Ld. Ray.* 1414. 1 *Tem Rep.* 463.

Formerly a *sci. fa.* could not be sued out without the transcript was returned.

There is a case in *Rep. Temp. Hard.* 351. *Goodright v. Hugoson*, where a motion was made to set aside a *sci. fa. quare*, &c. tested the last day of Michaelmas, and returnable the first day of Hilary term, because there was no transcript below yet returned. But Lord *Hardwicke* said, the practice is, that if the plaintiff in error is

(a) The record is never sent under seal. 2 *Str.* 1063. The C. J. always signs the return, but not necessary. *Barnes*, 201. 1 *Sid.* 268. It is usual only to send a transcript of the record, and not the record itself. 1 *Salk.* 337, 8. 341.

latory, the defendant must give a rule to transcribe, when if he will not, the defendant may nonpross the writ of error, and the court returned the *sci. fa.* not maintainable, but made no rule, the defendant in error having consented it should be set aside.

The following case has now decided that question.

Error on a judgment from C. P. to K. B. returnable three weeks Easter, wheresoever, &c. being on the 19th April 1812. A rule to certify the record was given 22d April, which expired the 30th. The transcript money was paid. On the 2d of May following a writ of *scire facias quare executionem non* was issued, returnable in three weeks of Easter wheresoever, &c. (being the 3d May) and was left with the sheriff for a nihil to be returned. The transcript of the record was not delivered over by the clerk of the errors to this court until the 4th of May. The plaintiff in error moved to set aside the *sci. fa.* and all subsequent proceedings thereon for irregularity, on the ground that the *sci. fa.* was issued in this court before the transcript was carried over, so as to warrant it. On hearing cause the court held, that as the plaintiff in error had paid the transcript money, although the transcript was not carried over by the clerk of the errors till the 4th, the defendant had a right to proceed, and discharged the rule with costs. *Dame Branscombe v. Hughes. E. 52 Geo. 3.* The transcript ought to have been carried over on the return of the writ. N. B. It appeared in this case, that a second *sci. fa.* was left with the sheriff for return of nihil, returnable on the morrow of the Ascension, the 8th June, and the application was not made till the 11th June. Properly the application should have been made the moment the first *sci. fa.* was discovered at the office.

Although the transcript is not carried over, yet if it is paid for, the plaintiff in error may lodge his *sci. fa. quare, &c.* and proceed thereon.

This writ is directed to the sheriff of the county where the cause of action is laid, viz. in the declaration, and made returnable on a general return day, wheresoever, &c. if the original proceedings were by original; but if by bill or attachment, in that case the *sci. fa.* must be returnable on a day certain, for it ought to pursue the nature of the first process. *Eden v. Wills, 1 Str. 694. 2 Ld. Raym. 1417;* and if the transcript be brought in before the assign day of any term, may bear teste the last day of the preceding term, and made returnable the first day of the next, 1 *Term Rep. 17.*; and if brought in within the term, may bear teste the first day of the term, and fifteen days between the teste and return of both, will do.

Sci. fa. to be returnable on a general return day, where the proceedings are by original, aliter if by bill or attachment.

The alias cannot issue before the return of the first *sci. fa.* and to be tested the *quarto die post* of the first, *Salk. 599. 6 Mod. 86.* if proceedings by original; if by bill, on the return day.

On two nibles being returned, and judgment thereon, execution, &c.

Upon two nibles returned on *sci. fa. quare executionem non*, and judgment thereon, the defendant in error may have execution, though error is afterwards assigned. *Carth. 41. Com. Dig. 5 V. 399.*

To be ingrossed and left for return.

The writ of *sci. fa.* is to be ingrossed on a 5s. stamp, signed by Messrs. *Provost* and *Chambre*; a precept is to be made, pay them 1s. 8d. seal 7d. take it to the sheriff's office; if a nihil is returned, pay 1s. each name; if left for a *scire feci*, he makes out a summons to his bailiff, pay 2s. 6d. officer 5s. return 2s. each defendant's name. If there be two *sci. fa.*'s, the last need not lie four days in the office before the return, nor for a *scire feci*. 3 *Burr. 1723. Miller v. Yerraway.*

After the return day of the *sci. fa. quare, &c.* sued out by the defendants in error, and a four days rule to assign errors served on the plaintiff in error, though the judgment of *non pros* was entered, and execution sued out, before the expiration of the rule to assign errors, yet if error was not assigned in time, the execution stands good. 15 *East, 204.*

On a quarto die post of return to give rule to appear. 13 *East, 391. Sharp v. Clarke.*

On the *quarto die post* of the return day of the *scire facias*, if the defendant is warned, or upon a nihil returned on the alias, give a rule thereon, at the clerk of the rules, on a piece of plain paper thus: in error, "A. B. against C. D. rule on *sci. fa. J. A. attorney*;" (a) pay for same 3s. which rule expires in four days, exclusive of the day given (*Sunday*, and a dies non excepted); on which day he must assign errors and give a copy on stamp paper (4d. stamp) to the defendant's attorney in error, otherwise the attorney for the defendant in error may enter judgment on the *sci. fa. quod habeat executionem*; and take out execution thereon; but the writ of error still remains in force, and the defendant in error

(a) The rule on the *sci. fa.* should be given in the names of the original plaintiff and defendant; for the parties names are not altered until the assignment of error are delivered over; there can be no appearance. The rule in this case, is like a rule for judgment, four full days in court. *Hil. 57 Geo. 3. Goodwin v. Luger.*

can have no costs, unless he give a rule for the plaintiff to assign errors. See *Lill. P. R.* 613. Therefore the defendant's attorney in error, in order to obtain his costs, must after the expiration of the first rule apply to the master for a rule to assign errors on record, who will give it on the back of the draft of the *sci. fa. quare*, &c. enter it with the clerk of the rules, pay 3s. serve copy on plaintiff's attorney, and if he does not deliver his assignment of errors within the four days exclusive allowed by the rule, then sign a nonpros. 6 *Term Rep.* 367. There can be no nonpros signed without a rule to assign errors. *Leith v. McFarlan*, 3 *Burr.* 1772.

It was held formerly that the rule to appear and rule to assign the errors might be both given on the same day, being both for the same purpose, viz. to compel plaintiff to assign errors. *Sambidge v. Housley*, 2 *Term Rep.* 17. But this point came on again to be argued in Trinity term 1795, which was as follows. In Hilary 1795, the defendant in error obtained judgment in C. P. plaintiff sued error, returnable last Easter term. Record having been certified in E. vacation, defendant, four days before this term, being T. T. 35 *Geo. 3.* sued out a *scire facias quare executionem non*, tested the last day of Easter term, and returnable the first return of this term, and gave notice thereof. On the first day of this term, being 5th June, the defendant in error gave a rule on the *sci. fa.*; and on the same day another rule for the plaintiff to assign errors on the record. The reporter states the former of these rules expired on a *Wednesday*, the latter on *Tuesday*, the day preceding the expiration of the other rule. The plaintiff obtained a rule to shew cause why the rule to assign errors should not be discharged. Lord *Kenyon*—It seems to me, that these rules are inconsistent. The plaintiff in error is called upon to assign errors, before he is required to appear in his court. The latter rule should precede the former. Rule absolute. *James v. Staples* in error, 6 *Term Rep.* 367. This determination is agreeable to the ancient authorities, as well as the practice, and also agrees with the entry on the roll.

N. B. It appears to me, that both the rules expired on the same day, being given on *Friday*.

A rule to assign errors was set aside, because given before any rule on *sci. fa.* *Marshal v. Cope*, 2 *Str.* 917. 2 *Barn. K. B.* 60. S. P.

It is irregular to rule the plaintiff to assign errors before the expiration of the rule to appear to the *sci. fa.*

If no Assignment.

If no assignment, how to proceed.

If the plaintiff in error delivers no assignment of error on the expiration of the rule given, which must be before four in the afternoon, of the fifth day after rule entered (*Sunday* not being the last day of the rule,) then the defendant will be at liberty to take out his execution. *Ydr. 7. Com. Dig. 299. 7 East, 111.*

If plaintiff in error suffers execution to go for want of an assignment, then how to proceed to obtain costs.

If the plaintiff in error suffers the execution to go for want of assigning the errors in due time, the defendant may notwithstanding go on for his costs, which may be done by obtaining a rule from the master on the back of the *sci. fa.* to assign errors; enter it at the clerk of the rules, and serve copy, pay for the rule 3s. If no assignment delivered within the four days (one day inclusive, and the other exclusive,) then sign a nonpros, which is done by obtaining a roll, and entering thereon an exact copy of the transcript, which may be done on a roll of the term; you sign it with the judgment of nonpros; then take a 10s. stamp judgment paper, and enter a copy of the transcript thereon, the same as on the roll, as far as the names of the parties, sign the judgment with Mr. Clarke at the judgment office, take the same to the master, who will tax the costs and mark them on the roll, then sue out execution. N. B. The master must have the roll to mark the costs on. (a)

Of assigning Errors.

If assignment how to proceed.

Few parties after transcript, suffer the writ to be nonprossed, especially if real errors exist, but will assign errors, which is signed (though common errors are assigned) by counsel, engrossed on a 4d. stamp paper, and delivered over to the opposite attorney.

If want of original assigned, how to proceed.

If the errors assigned are for want of an original warrant of attorney, &c. or some other matter necessary to render the record perfect or complete, which is termed

(a) It is said the entries are to be made on a roll the term the transcript is of; but I see in the entries in *S Lord Raymond*, that they are made *the same term the judgment is signed, which saves a post terminum roll.* I have inquired into this, and find it to be so.

leging diminution of the record; then it lies on the defendant to force the plaintiff to return the writ of certiorari, which is done by application to the master, who will give the rule on the back of the draft of *sci. fac. v. executionem non*, to return the writ of certiorari, which must be entered by the clerk of the rules, pay 8s. and give a copy on the plaintiff's attorney. 1 Salk. 267. This is a four-day rule.

The plaintiff in error's attorney on service of this rule must make out the certiorari; sign it with Messrs. Prothonotary and Chambre, pay 1s. 8d. seal 7d. and leave it with the custos brevium of the Common Pleas to certify; when returned, it is to be filed with the clerk of the treasury at Westminster. The defendant's attorney searches for it there, and if returned, bespeaks a copy of it.

Certiorari to be made by plaintiff.

If the certiorari is not returned and filed by the time appointed by the rule, the benefit of it is lost, 1 Salk. 57.; and the defendant may join in error, by pleading *nullo est erratum*, and enter a *non misit breve* on the record, without taking any notice of the diminution; and the assignment of error, as to that part, is void. The defendant at his own expence cannot take out the certiorari. Comyn's Rep. 115.

If not returned, how to proceed.

The certiorari must not bear teste before the errors are assigned. *Ld. Raym.* 1554. 2 *Str.* 819. And after a certiorari has been returned, no second certiorari can issue without motion in court by counsel. R. E. 11 *Car.* 1. This means by the plaintiff in error.—But if a variant original is returned on the first, the defendant in error may sue out a second. *Salk.* 266. *Vide Str.* 765. *Com.* 118. and have a proper one returned thereon.

Teste of certiorari.

Of Joinder in Error and Argument.

If special errors be assigned, defendant may join in error, which need not be signed by counsel; engross and deliver the same on a 4d. stamp paper to the plaintiff's attorney. The like if general errors be assigned.

If errors are special.

After joinder either party may move the court for a *concilium*, counsel's fee 10s. 6d. the rule must be drawn up at the clerk of the rules, pay 6s. 6d.; and served on the opposite attorney. The proceedings are to be entered on rolls as of the present term, beginning with the writ of error, to the end of the final judgment in the C. P. then add the assignment of errors and joinder, make

After joinder, how to proceed.

copies of the whole proceedings as on the rolls for the judges, the same as on a demurrer. At the top of the roll write as yet of term 57th Geo. 3. Witness, *Edward Lord Ellenborough*.

When the entries are made on the roll take same to Mr. *Clarke*, the clerk of the judgments, King's Bench office, who will enter the pleadings, pay for the entry; then go to Messrs. *Platt*, the clerks of the papers, who will mark the roll, read, take the motion paper for concilium and roll to the clerk of the rules, who will draw up the rule for argument, enter the same with the clerk of the papers, and serve copy of the rule on the opposite attorney.

And copies for argument.

The plaintiff is to deliver two copies to the chief justice and the senior judge, the defendant two other copies to the other judges. R. M. 17 Car. 2. Pay each clerk 2s.

Counsel's names and exceptions marked.

The names of the counsel are to be put to the pleadings, and the exception intended to be insisted upon in argument, should be marked in the margin, and to be delivered as directed by the rule, Trin. 40 Geo. 3. See title *Demurrer*.

N. B. Counsel must have a copy of the paper-book to move for judgment, or argue the errors.

If plaintiff's attorney neglects to deliver books.

If plaintiff's attorney neglects to deliver the books at his part, defendant in error may deliver all; then judgment will be given of course against the plaintiff in error, defendant's attorney draws up the rule at the clerk of the rules, for judgment; pays 6s. 6d.; stamp it with a 10s. stamp, and the master will tax the costs without a bill, but you must have the roll for him to mark, bespeak it of the clerk of the treasury, to bring it to the master if carried in, if not, take it with you.

No rule for judgment.

There is no rule given for judgment in this case; but the judgment of the court of K. B. must be entered thereon, before the costs can be taxed.

Form of the docket paper.

The entries of A. B. gent. one, &c. of the term of, &c.

England. Entry of proceedings in error between C. D. plaintiff in error, and A. B. defendant in error, for not assigning errors (or being an affirmance of the judgment of the court of common bench at *Westminster*) for 50l. damages, and 14l. costs in error.

Of Interest.

It is now settled that the party is to pay interest on the judgment. 2 Term Rep. 78. But not allowed in replevin or rent, 10 East, 2. *Golding v. Dias*. No interest on an attorney's bill. 2 B. & P. 210. *Walker v. Bayley*.

In *Zinckes v. Langton*, a rule was made absolute, in affirmance in the K. B. for the master to compute interest on the sum found from the day of signing final judgment below, and to be added to the costs taxed on the affirmance. Doug. 752. in notes. Rule absolute to compute interest, &c.

If general Errors assigned.

It may happen that the plaintiff in error will not assign the want of an original, &c. or pray a *certiorari*, therefore in that case the general assignment, "that the judgment is given for plaintiff, whereas it ought to have been given for the defendant," is made; in that case you may deliver the joinder on a 4d. stamp forthwith, and move for a concilium, as before, without a rule to return the *certiorari*. If general errors assigned.

The defendant in error voluntarily takes notice of the assignment of errors, by delivering his joinder in *nullo est erratum*. If assignment of errors is delivered, a rule to join in error may be given by the master, to force defendant in error to proceed. (a) Joinder. Rule to join in error.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas A. B. lately in our court before Sir Vicary Gibbs, Knight, and his companions, our justices of the Bench at *Westminster*, by our writ, and by the judgment of the same court, recovered against C. D. late of *Westminster*, in your county, yeoman, 47l. 10s. for his damages, which he sustained by occasion of the not performing certain promises and undertakings lately made by the said C. to the said A. at *Westminster*, in your county, as for his costs and charges by him about his suit in that behalf laid out, Scire facias quare executionem non.

The return of this is to be guided by the original proceedings. Str. 694.

(a) The writ of *sci. fa. ad audiendum errores* is now out of use, as defendant in error appears gratis, or plaintiff may compel him to join in error by the above rule. *Carth.* 40. *Moseley v. Corks*, being entered with the clerk of the rules, and a copy served on the attorney, pay 3s.

whereof the said C. is convicted, as by the record and proceedings thereof, which we lately caused to be brought into our court before us, for certain causes of error, manifestly appears; and now on behalf of the said A. we have been informed, in our said court before us, that although judgment be thereon given, yet execution of the damages aforesaid still remains to be made to him the said A. whereupon the said A. hath humbly besought us, that we should provide him a proper remedy in this behalf; and we being willing that what is just and right should be done in this particular, command you (b) that by honest and lawful men of your bailiwick, you make known to the said C. D. that he be before us on wheresoever we shall then be in England, to shew if he has or knows of any thing to say for himself, why the said A. ought not to have his execution against the said C. for the damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive what our said court before us shall then and there consider of him in this behalf, and have there the names of those by whom you shall so make known to him, and this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 57th year of our reign.

(b) In the alias say, "as before we have commanded you."

Law and Markham.

Præcipe.

Middlesex. Sci. fa. quare, &c. between *John Doe* plaintiff, and *Richard Roe* defendant, for 47l. 10s. damages, returnable on wheresoever, &c.

J. B. attorney.

To be signed by Messrs. *Provost and Chambre*; pay 1s. 8d. seal 7d.

After error allowed, defendant in error became bankrupt, assignees to proceed in bankrupt's name.

After judgment, a writ of error was brought, allowed, and served; afterwards defendant in error became a bankrupt, and his assignees sued a *scire facias quare executionem non*; motion to quash the writ. *Buller, J.*—The rule is, that the assignees cannot make themselves parties to the record in any intermediate stage of the proceedings, but must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose. Here the assignees should have gone on with the writ of error in the bankrupt's name till judgment. Rule absolute. *Kretchman v. Beyer*, 1 Term Rep. 463.

— term, in the 57th year of the reign of king *George the third*.

Law and Markham.

C. D. } Afterwards, that is to say, on
 agt. } next after
 A. B. } this same term, before our lord the king at
Westminster, comes the said C. D. by J. B. his attorney,
 and says, that in the record and proceedings aforesaid,
 and also in the giving of the judgment aforesaid, there is
 manifest error in this, to wit, that the declaration afore-
 said, and the matters therein contained, are not sufficient
 in law for the said A. B. to have or maintain his aforesaid
 action thereof against the said C. D.; there is also error
 in this, to wit, that by the record aforesaid it appears, that
 the said C. D. was attached to answer to the said A. B.
 in the plea aforesaid, yet no original writ between the
 parties aforesaid, in the plea aforesaid, is filed of record
 or remaining of record in the said court of the Bench at
Westminster aforesaid; therefore in that there is mani-
 fest error: there is also error in this, that it appears by
 the record aforesaid, that the judgment aforesaid, in
 form aforesaid given, was given for the said A. against the
 said C. whereas, by the law of the land, the said judgment
 ought to have been given for the said C. against the said
 A.; and the said C. prays a writ of our said lord the king
 to be directed to the *custos brevium* of the said court of
 the Bench at *Westminster*, to certify to the said lord the
 king the truth of the same, and it is granted to him, &c.
 And the said C. prays that the judgment aforesaid, for the
 errors aforesaid, and other errors in the record and pro-
 ceedings aforesaid, may be reversed, annulled, and alto-
 gether held for nothing; and that he may be restored to
 all things which he hath lost by occasion of the said judg-
 ment, &c. (a)

S. M.

Assignment of
 errors, that
 in there is no
 original writ
 filed of record
 where error
 from C. P. to
 K. B.

The errors are
 expensive if
 not true, as a
 certiorari must
 be obtained.

If you assign the want of warrants of attorney for error,
 go to the end of the general errors and say, there is also
 error in this, to wit, that there is no warrant of attorney
 filed, or remaining of record, in the court of the lord the
 king of the Bench at *Westminster*, between the parties
 aforesaid in the plea aforesaid, to warrant the said J. K.
 to be attorney for the said A. B. against the said C. D.
 in the plea aforesaid; therefore in this there is manifest
 error; and the said C. prays a writ of our lord the king to

The like for
 of the warrant
 of attorney
 assigned.

(a) The assignment of errors for the want of an origi-
 nal writ, and warrants of attorney are expensive, as there
 must be two certioraris issued, the one to the chief jus-
 tice, and the other to the *custos brevium*.

be directed to the chief justice of the said court of the Bench, to certify to our said lord the king the truth of the same, and it is granted to him, &c.; and the said C. prays, &c. as above.

Certiorari to
certify war-
rant of at-
torney.

To be ingros-
sed on 11.
stamped
parchment
signed by
Messrs. Pro-
vost and
Chambre,
1s. 8d. seal 7d.

George the third, &c. To our right trusty and well-beloved Sir Vicary Gibbs, knight, our chief justice of the Bench, greeting: We being willing for certain causes to be certified, whether A. B. made J. D. gentleman, his attorney on record, against C. D. late of W. in the county of *Middlesex*, yeoman, in a plea of trespass on the case, before you and your companions, our justice of the Bench aforesaid, do command you, that you search the rolls, and other memorandums, of warrants of attorney, for the county of *Middlesex*, being in your custody, filed of record of term, in the year of our reign, and what you shall find therein, concerning the said warrant of attorney between the parties aforesaid, of the plea aforesaid, you certify to us without delay, wheresoever we shall then be in *England*, as fully and entirely as the same remains in your custody, together with this writ. Witness *Edward Lord Ellenborough, &c.*

Law and Markham.

Præcipe.

Middlesex. *Certiorari* to certify a record of warrants of attorney between A. B. plaintiff, and C. D. late of, &c. defendant: returnable without delay.

Certiorari to
certify the
original, 20s.
stamp.

George the third, &c. To our right trusty and well-beloved holding the office of keeper of the writ, rolls, and records of our court of the Bench, greeting: we being willing, for certain causes to be certified, whether any original writ between A. B. and C. D. late of *Westminster*, in the county of *Middlesex*, yeoman, in a plea of trespass on the case, be filed in your custody or not, do command you, that you search our original writs directed to our sheriff of *Middlesex*, and which are filed of record in your custody of term (the term the original is returnable), in the 57th year of our reign, what you shall find therein of an original writ issued between the parties aforesaid, of the plea aforesaid, you certify to us without delay, wheresoever we shall then be in *England*, together with the return and indorsement thereof, as fully and entirely as the same remain in your custody; and have there this writ. Witness *Edward Lord Ellenborough, at Westminster, the day of in the 57th year of our reign.*

Law and Markham.

Middlesex. *Certiorari* to certify an original writ, between A. B. plaintiff, and C. D. defendant: returnable without delay. Præcipe.

C. D. } Trinity term, in the 57th year of king
against } George the third.
A. B. }

Markham and Le Blanc.

Afterwards, to wit, on _____ next after
in this same term, before our lord the king Assignment of
at *Westminster*, comes the said C. by A. K. his attorney, general error
and says, that in the record and process aforesaid, there where the
is manifest error in this, to wit, that the declaration error is from
aforesaid, and the matters therein contained, are not suf- C. P. to K. B.
ficient in law for the said A. to have or maintain his
aforesaid action thereof against him the said C.; there is
also error in this, to wit, that by the record and process
aforesaid, it appears, that the judgment aforesaid, in form
aforesaid given, was given for the said A. against the
said C. whereas by the law of the land, the said judg-
ment ought to have been given for the said C. against
the said A.; and the said C. prays that the judgment
aforesaid, for the errors aforesaid, and other errors in the
record and proceedings aforesaid, may be reversed, an-
nulled, and altogether held for nothing, and that he may
be restored to all things which he hath lost by occasion of
the said judgment, &c. (a)

The plaintiff may assign for error, an error in fact, or Errors in fact
errors in law, F. N. B. 20. E. On error in fact assigned, and law may
plaintiff may conclude with an averment, for defendant be assigned.
may put it in issue if he pleases. 1 *Burr.* 410. But he
cannot assign both; for this will be double. 1 *Sid.* 147.
1 *Lev.* 105, 76. If error in fact and in law be assigned,
as that the defendant was an infant at the time of the
promises being made, and also appeared by attorney, the
defendant may demur specially, and judgment will be If both, may
affirmed. *Burdett v. Wheatley*, 2 *Ld. Ray.* 883. demur.

And hereupon afterwards, to wit, on _____ next
after in the _____ year of the reign of our said Joinder in
lord the king, the said A. by his said attorney, freely nullo est er-
comes here into court, and says, that there is no error either ratum.
in the record and proceedings aforesaid, or in giving the
judgment aforesaid; and he prays that the said court of

(a) Although special errors are assigned, yet if they
are all errors in law, you must conclude with the general.

Need not be
signed by
counsel.

Joinder in
error where
the want of
an original is
assigned.

Here recite
the return.

our said lord the king, now here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above for error assigned: and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed: but because the court of the said lord the king, now here, is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid to come before the said lord the king on _____ wheresoever, &c. to hear the judgment aforesaid, for that the court of the said lord the king, now here, is not yet advised thereof, &c.

Which said writ of *certiorari*, so prayed and granted follows in these words, to wit: *George* (here set forth the writ of *certiorari* verbatim, *Law* and *Markham*.) then say, which said keeper of the writs, rolls, and records returned and certified to our said lord the king, that having searched the original writs, directed to the sheriff of _____ which were filed of record, in his custody of _____ term, in the _____ year of the reign of the said lord the king, they found that there was an original writ, between the parties in the said writ named, in a plea of trespass on the case, directed to the sheriff of _____

filed of record in his custody of the term aforesaid, the tenor of which said original writ, (together with the return and indorsement thereof, as fully and entirely as the same remained in his custody,) he did certify to our said lord the king, as appears by the schedule, so annexed to the said writ of *certiorari*, follows in these words, to wit: *George* the third, &c. (here copy the schedule) then say, which said writ of *certiorari*, together with the return of the same, is filed among the records without day, of _____ term aforesaid, and hereupon afterwards, to wit, on _____ next after _____ in the _____ year

of the reign of the said lord the king, the said A. by his attorney aforesaid, freely comes here into court, and says, that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid: and he prays that the court of the said lord the king, now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid for error assigned, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed; but because the court of the said lord the king, now here, is not yet advised what judgment to give of and upon the premises aforesaid, a day is given therefore for the parties aforesaid to come before the said lord the king on _____

Continuance.

(a) The day of
concilium.

(a) to hear the judgment aforesaid, for that

he said court of the said lord the king, now here, is not yet advised thereof, &c.

As before, to the end of the *certiorari*; *Law and Markham*; which said chief justice of the Bench aforesaid returned, and certified unto our said lord the king, that by virtue of the said writ of *certiorari*, he had searched the rolls and other memorandums of warrants of attorney for the county of *Middlesex*, in his custody, filed of record, of term, in the year of the reign of the said lord the king, and that he had found in the same, that there was a warrant of attorney between the said A. B. and C. D. of the plea within mentioned, in his custody, filed of record of the term aforesaid; the tenor of which said warrant of attorney, as fully as the same remained in his custody filed of record, he the said chief justice thereby certified to the said lord the king, as appeared by the schedule thereunto annexed, as the said chief justice was in the said writ of *certiorari* commanded: which said schedule, so annexed to the said writ of *certiorari*, follows in these words, to wit (the rolls of warrants of attorneys, &c.) here copy the schedule; then say, which said writ of *certiorari*, together with the return thereof, among the records, without day of term aforesaid s filed. And hereupon (as in the former.)

Joinder where the want of a warrant of attorney is assigned.

At which day, before the lord the king at *Westminster*, came the parties aforesaid by their attorneys aforesaid: whereupon, as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said C. above for error assigned, being seen and fully understood by the court of the said lord the king, now here, and mature deliberation had thereupon: it appears to the court of the said lord the king, now here, that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid: therefore it is considered that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and to stand in its full force and effect (the said causes above for error assigned in any wise notwithstanding): And it is further considered, that the said A. do recover against the said C. as well his damages aforesaid, as also 14l. adjudged to him at his request, by the court of the lord the king, now here, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he hath sustained and expended by reason of the delay of the execution of the judgment aforesaid, on pretence of the prosecution of the said writ of error, which said damages, costs and charges, in the whole

Entry of affirmation of judgment in King's Bench.

Judgment signed day of 1817.

amount to £ , and that the said A. B. have his execution thereof, &c. and the said C. D. in mercy, &c.

K. B. award execution or affirmance.

Though a transcript of the record is only removed into the King's Bench, on a writ of error from the Common Pleas, the King's Bench award the execution. *Vicars v. Haydon*, *Cowp. Rep.* 843. And may in all cases give such a judgment, as the court below should have given, and if necessary, may award an inquiry to assess the damages.

Judgment of reversal where error is from C. P. to K. B. There are no costs in this case. - 5 East, 49. 1 Str. 617.

At which day, before the said lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid, whereupon as well the record and proceedings aforesaid, and the judgment aforesaid, in form aforesaid given, as the matter aforesaid, by the said C. for error assigned, being seen and fully understood by the court of the said lord the king, now here, and mature deliberation had thereupon: it appears to the court of the said lord the king now here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error: therefore it is considered, that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings, be reversed, annulled, and altogether held for nothing; and that the said C. be restored to all things which he hath lost by occasion of the judgment aforesaid, &c.

The entry of a nonpross after scire facias quare executionem non in error for want of assigning errors in K. B.

Where scire feci on the first sci. fa. is returned.

Afterwards, to wit, on next after
in this same term, before the lord the king at *Westminster*, comes the said A. B. by his attorney aforesaid, and says, that execution of the judgment aforesaid still remains to be made unto him; therefore he prays the writ of our said lord the king to be directed to the sheriff of the county of *Middlesex* aforesaid, that he cause to be made known to the said C. D. to be before our said lord the king wheresoever, &c. to shew if any thing he has or knows to say for himself, why the said A. B. ought not to have execution of his damages, costs, and charges aforesaid, according to the form and effect of the judgment aforesaid; and it is granted to him, &c. Therefore the sheriff is commanded, that by good and lawful men of his bailiwick, he make known to the said C. D. that he be before our said lord the king (the return of the *scire facias quare*, &c.) wheresoever, &c. to shew in form aforesaid, if, &c. and further, &c. the same day is given to the said A. B. &c. at which day the said A. B. by his attorney aforesaid, comes before our said lord the king at *Westminster*, and offers himself against the said C. D.

in the plea aforesaid, and the sheriff (to wit)

Esq. and Esq. sheriff of the said county of *Middlesex*, return that by virtue of the said writ to him directed, by J. W. and W. P. good, &c. Scire feci. he has given notice to the said C. D. to appear, &c. to shew as by that writ he was required; and the said C. D. being solemnly called, doth not come, but makes default; and hereupon the said A. B. says, that the said C. D. hath assigned no error or errors in the record and proceedings aforesaid; therefore a day is given to the parties aforesaid, to come before our lord the king, wheresoever, &c. that is to say, for the said C. D. to assign error or errors in the record and proceedings aforesaid. At which day, before the said lord the king at *Westminster*, comes the said A. B. by his attorney aforesaid; and the said C. D. at that day being solemnly called doth not come, but again makes default, nor does he farther prosecute his said writ of error against the said A. B. wherefore it is considered, that the said C. D. take nothing by his said writ, and that the said A. B. go thereof without day, &c. and that the said A. B. have his execution against the said C. D. of his damages aforesaid, according to the force, form, and effect of the said recovery, &c. Therefore it is also considered that the said A. B. do recover against the said C. D. by the court of our said lord the king now here adjudged to the said A. B. by his assent according to the form of the statute in such case made and provided, for his damages, costs and charges which he hath sustained and expended by reason of the delay of execution of the judgment aforesaid on pretence of prosecuting the said writ of error, and that the said A. B. have execution thereof, &c. and the said C. D. in mercy, &c.

Plaintiff in error makes default.

In the Exchequer-chamber these entries are all made by Mr. *Smith*.

The writ of execution on these judgments must be issued in the county where the original venue was laid, and if to be levied in any other county a *testatum* is to issue, and to ground it, the first writ must issue, and may afterwards be returned.

To be issued in the county where venue laid.

George the third, &c. to the sheriff of *Middlesex*, greeting: We command you, that of the goods and

A ca. sa. for ditto.

George the third, &c. to the sheriff of *Middlesex* greeting: We command

A fi. fa. on a judgment affirmed in the Exchequer-chamber from the King's Bench.

chattels in your bailiwick of C. D. you cause to be made 56l. which A. B. lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against the said C. D. for his damages, which he had sustained, as well by reason of the not performing certain promises and undertakings made by the said C. to the said A. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. is convicted, as appears to us of record; and also 1. which to the said A. in our court of Exchequer-chamber at *Westminster*, before our justices of the Bench, and the barons of our Exchequer of the degree of the coif there, according to the form of the statute lately made and provided, were adjudged for his damages, costs, and charges, which he had by reason of the delay of the execution of the judgment aforesaid, on the pretence of the prosecution of our writ of error brought thereupon by the said C. against the said A. the said judgment being there in all things affirmed, whereof the said C. is also convicted; as by the record and proceedings of our said justices and barons before them had in the premises, and by them remitted into, and now remaining in our said court before us at *Westminster* aforesaid, also appears to us of record:

And have you the said And have there then the monies before us at *Westminster*, on next after to render to the said A. for his damages, costs, and charges aforesaid; and have there then this writ. Witness, &c.

Law and Mathias

If on a nonpros for not assigning errors in the Exchequer-chamber.

If it is on a *nonpros* for not assigning errors, then go to the end of the first recovery, and say, "And also 11l. adjudged to the said A. in our said court of Exchequer-chamber, by our justices of our court of Common Bench, and our barons of our Exchequer of the degree of the coif, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he hath sustained by reason of the delay of the execution of the judgment aforesaid, on pretext of prosecuting our writ for correcting of error, brought there

upon, because the said C. did not prosecute the said writ of error with effect, of which the said C. is also convicted, as by the record and proceedings of our said justices and barons before them had in the premises, and by them remitted to and remaining in our said court before us at *Westminster*, also appears to us of record. And have," &c.

If it is from the Common Pleas to the King's Bench, for not assigning errors, then as follows :

Fi. fa. in Assumpsit.

George the third, &c. to the sheriff of *Middlesex*, greeting: We command you that you cause to be made of the goods and chattels of C. D. late of, &c. yeoman, in your bailiwick, 200l. which A. B. lately in our court before Sir Vicary Gibbs, knt. and his companions, then our justices of the Bench at *Westminster*, recovered against the said C. for his damages which he sustained by the means of the not performing certain promises and undertakings lately made by the said C. to the said A. at *Westminster* in your county whereof the said C. is convicted,

Ca. sa. in Assumpsit.

George, &c. to the sheriff of *Middlesex*, greeting: We command you, that you take C. D. late of, &c. yeoman, if he be found in your bailiwick, and safely keep him, so that you have his body before us at *Westminster*, on wheresoever we shall then be in *England*, to satisfy A. B. 600l. for his damages which the said A. B. lately in our court before Sir Vicary Gibbs, knt. and his companions, then our justices of the Bench at *Westminster*, recovered against the said C. for his damages which he sustained by reason of the not performing certain promises and undertakings, made by the said C. to the said A. at *Westminster*, in your county, whereof the said C. is convicted,

For not assigning errors from C. P. to K. B.

as by the inspection of the record and proceedings thereof which we lately caused to come into our court before us at *Westminster*, for certain supposed causes of error therein, and which now are there remaining, appears to us of record : and also 11l. which were awarded to the said A. in our court before us at *Westminster*, according to the form of the statute in such case made and provided, for his damages, costs and charges, which he had sustained by occasion of the delay of execution of the said judgment, on pretence of prosecuting our writ for correcting errors

brought thereupon by the said C. against the said A. because the said C. did not prosecute the said writ with effect, whereof the said C. is convicted, as appears to us of record :

And have you the said monies before us, on

wheresoever we shall then be in *England*, to render to the said A. for his damages, costs, and charges this writ. Witness, *Edward*

And have you there the writ. Witness, &c.

Law and Markham.

(To be sealed on they.)

aforesaid, and have there this writ. Witness, *Edward Lord Ellenborough, &c.*

Law and Markham.

Fi. Fa. in Debt upon affirmation in the King's Bench from Common Pleas.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you cause to be made of the goods and chattels in your bailiwick of C. D. late of *Westminster* in your county, yeoman, as well a certain debt of 40*l.* which A. B. lately in our court, before Sir *Vicary Gibbs*, knight, and his companions, our justices of the Bench at *Westminster*, recovered against the said C. as also 10*l.* for his damages which he sustained by reason of the detaining the said debt,

Fi. Fa. in Debt upon affirmation in the King's Bench from Common Pleas.

George, &c. to the sheriff of *Middlesex*, greeting: We command you, that you take C. D. late of *Westminster* in your county, yeoman, if he be found in your bailiwick, and him safely keep, so that you have his body before us in eight days of St. Hilary, wheresoever we shall then be in *England*, to satisfy A. B. as well a certain debt of 28*l.* which the said A. B. lately in our court, before Sir *Vicary Gibbs*, knight, and his companions, our justices of the Bench, at *Westminster*, recovered against the said C. as also 16*l.* which, in our said court of the Bench, were adjudged to the said A. B. for his damages which he sustained by occasion of [the detaining the said debt,

Return to be as the original proceedings were; if by original, then

whereof the said C. was convicted, as by the record and proceedings thereof which we lately caused to come into our court before us, for certain causes of error, now there remaining, appears to us of record: and also 14*l.* which

are adjudged to the said A. in our said court before at *Westminster*, according to the form of the statute such case made and provided, for his damages, costs, and charges, which he had expended by occasion of the day of the execution of the judgment aforesaid by the sentence of the prosecution of our writ of error brought by the said C. against the said A. of and upon the premises aforesaid, upon which said writ of error, the judgment aforesaid, against the said C. being in our said court before us, in all things affirmed, whereof the said C. is also convicted, as appears to us of record:

on a general return day, wheresoever, &c. If by bill or attachment, then on a day certain.

And have you the said And have you there this
monies before us on writ. Witness, &c.

wheresoever we shall then be in England, to
render to the said A. for his debt and damages, costs,
and charges aforesaid, and also this writ. Witness, &c.

Law and Markham. (a)

George, &c. to the sheriff of M——, greeting: Whereas, A. S. lately, that is to say, in Trinity term, in the 57th year of our reign, in our court, before Sir *Vicary Gibbs*, knight, and his companions, then our justices of the Bench at *Westminster*, by our writ, and by the judgment of our said court, recovered against J. O. late of, &c. 100l. which in our said court of the Bench aforesaid were awarded to the said A. for her damages which she had been put unto about her suit in that behalf, whereof the said J. O. was convicted, as by the record and proceedings thereof which we lately caused to be brought into our court before us, for certain causes of error, appears to us of record. And by reason of divers errors in the said record and proceedings, and also in giving the said judgment, we have reversed and totally annulled the same; and we have further considered in our said court before us, that the said A. be restored to all things which he hath lost on occasion of the said judgment; and for that the said A. sued out execution upon the said former judgment, and he the said J. was thereupon taken in execution for the same, and detained in prison until payment was made to the said A. of the said

Writ of restitution on reversal by the K. B. of a judgment given in C. P. and fi. fa. for money paid.

(a) If it is necessary to sue out a *testatum* you need only put the *testatum* part, at the end of the word aforesaid, and our sheriff of ——— hath returned to us that, &c. See title *Execution*.

100l. as we have been informed. Therefore we command you That of the goods and chattels of the said A. in your bailiwick you cause to be made and levied the said 100l. and have you that money before us, on ^{where-}soever, &c. to restore to the said J. the said 100l. so adjudged to him; by our said court before us, upon the reversal of the said judgment; and have there this writ Witness, &c.

If it appear
party is paid.

Where the money appears upon the record to be levied and paid to the party, the defendant shall have restitution without a *sci. fa.* *Salk.* 588.

Restitution.

If judgment is reversed, the party shall be restored to all that he has lost, and a writ of restitution shall be awarded. 2 *Cro.* 698. Vide 4 *Mod.* 161. as to the value sold for. If the money is levied and not paid, a writ of restitution shall not go against the sheriff without a *sci. fa.* *Salk.* 588.

Error quæ coram nobis, &c. resident.

This writ lies to the same court in which the judgment was given.

If judgment
be erroneous
in matter of
fact.

If a judgment in this court be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the same court by writ of error *coram nobis*, or *quæ coram nobis resident*; so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king before the king himself; as where the defendant being *under age*, appeared by attorney, or the plaintiff or defendant was a *married woman*, at the time of the commencing the suit, or *died before verdict*, or *interlocutory judgment*; for error in fact is not the error of the judges, and reversing it, is not reversing their own judgment. *Salk.* 145. 1 *Sid.* 208.

In the Com-
mon Pleas.

In the Common Pleas, the record and process being stated to remain before the king's justices, the writ of error is called a writ of error *coram vobis*, or *quæ coram vobis resident*.

This writ does not lie in this court after affirmance, or in the Exchequer-chamber. 2 *Str.* 949, 975, 690.

As to bail.

It is said, 1 *Lill. Pract. Reg.* 710. & 2 *Crompt.* 394. that the statutes requiring bail in error, do not extend to this writ. But the practice of this court is, *after verdict*, bail is required, to prosecute the writ with effect, and if the judgment be affirmed, that the bail pay the damages and costs awarded, by the delay of the execution.

In the case of *Birch v. Triste*, Lord *Ellenborough* says, Not of itself error of matter of fact *coram nobis*, which is not within statutes requiring bail in error, the writ of error is not itself a *supersedeas* in the first instance; but is or is not according to circumstances; and those circumstances the court will inquire into on motion for leave to take out execution: in case therefore of error brought *coram nobis*, the practice is that the defendant in error shall move the court for leave to take out execution. See *Say. Rep.* 36. *Ribout v. Wheeler*. Where *Denison, J.* said, before writ of error *coram nobis*, it not being a writ of right, is allowed, there must be an affidavit of some error in fact, which if true, the right of action will be destroyed. *East*, 415.

Carth. 368.

The cursitor will not make out this writ, unless he has an affidavit sworn before a master in Chancery of the age of the infant, and a copy of the register of baptism, taken from the register book, and examined by the person who wears to it, that it is a true copy. So if feme covert brings this writ.

There must be an affidavit made to obtain the writ.

The usual way to apply for this writ is to give the cursitor of the county where the venue is laid, the declaration, and make him a *præcipe* for the writ, thus: *Mid-lessex* to wit. Writ of error *de coram nobis* between *John Doe* plaintiff, and *Richard Roe* defendant, in case on a judgment for the plaintiff by default (or on a judgment for plaintiff on verdict.) J. K. attorney.

When you have obtained it, in case the judgment be by default, no bail is required, take it to the master in court, who will allow it, pay 2s. 6d. then he gives it to the clerk of the rules, who draws up the rule for the allowance, who will return you the writ of error, serve the same on the opposite attorney, which rule operates as a *supersedeas* to the plaintiff's execution.

But if bail should be required (as after verdict) then when you have obtained the writ from the cursitor, take it to *Westminster-hall*, to the master, who will allow the same, and return it to you, pay 2s. 6d. who gives it to the clerk of the rules; in the evening go to the clerk of the rules, and he will draw up the rule for its allowance, in the original names of the plaintiff and defendant; and return you the original writ of error; serve a copy of rule on the opposite attorney, then apply to the clerk of the errors of this court, Mr. *Smith*, with the names and additions of the bail in error and the writ, and he will enter them in his book, and take the bail before a judge; when

If bail be required.

they have entered into the recognizance give notice to the opposite attorney, and also give notice to justify as in other cases within the time limited by the rule. I think it would be best to give two days notice to put in and justify bail, and speak to the clerk of the error to attend at *Westminster-hall* at the sitting of the court to take the same; counsel moves to justify as in other cases, and the rule for the allowance of the bail is drawn up and served as usual. N. B. The notice of bail and justification are to be intitled in the *original causes* you are to keep the writ of error, as you will have occasion to enter it on the roll when the issue is joined.

The roll of the original judgment need not be brought into court for the allowance of the writ of error.

Rule for allowance.

This writ never was allowed in vacation as I can learn

It is ordered, that the writ of error issued between the parties in this cause be allowed: and (upon the plaintiff in error putting in and justifying his bail within four days next ensuing,) that further proceedings be stand as the judgment in the original action until the said writ of error now depending between the parties be determined. (a).

An infant ought to have a guardian appointed by the court to prosecute the writ, as in other cases, before assignment of errors: vide *Coke's Entries*, title Error; and he should assign them by guardian.

Rule to assign errors.

When the writ is returnable, apply to the master for a rule to assign errors, which he will give in this form A. B. v. C. D. "Unless the plaintiff in error assigns errors within four days next after notice given to him or his attorney, a nonpros may be signed," which take to the clerk of the rules to enter, pay 3s. he will write the word "entered" upon it; serve copy on the attorney.

(b) See Tidd's Forms, 509. Fitz. N. B. 45. 7 ed.

(b) The error to be assigned must be of a fact only. To the assignment of infancy the defendant in error may reply, both of which are to be signed by counsel.

If error be well assigned.

The assignment of the errors in the first instance, does not take notice of the writ of error, nor in the replication.

(a) The recognizance of bail is to prosecute the writ of error with effect, if judgment be affirmed, and to pay the damages and costs awarded.

Court of King's Bench will oblige defendant to enter Waste. into a rule not to commit waste or destruction, pending the writ of error. *Wharod v. Smart*, 3 Burr. 1823.

Motion for leave to take out execution, notwithstanding error in parliament was pending, on an affidavit, that after judgment recovered here, defendant removed the record in the Exchequer-chamber, where judgment was affirmed, without argument or objection, which it was contended was equivalent to a confession, that there was no error, and that the writ of error was brought for delay. Court.—The mere circumstance of the defendant not arguing the case in the Exchequer-chamber, is by no means conclusive; since in some of the cases that have been most litigated in the House of Lords, the parties have waived all argument in the Exchequer-chamber. Rule refused. *Harrison v. Grote*, 6 Term Rep. 400.

Court will not permit execution to be taken out, pending error in parliament, on the ground that error is brought for delay, because there was no argument in the Exchequer-chamber and judgment affirmed there.

It seems, on inquiry, that an agent in error may be employed to conduct the writ of error in parliament, or the attorney may do all this himself; but the fees to the clerk in parliament, *Henry Cowper*, esq. must be paid; his office is in *Old Palace-Yard*, opposite *Westminster-hall*.

Agent may prosecute error in parliament.

As soon as the transcript is brought into parliament, a peer may be applied to, without any previous proceeding, to move the house for a day to be given to the plaintiff in error, to assign his errors in eight days, which will be ordered, and the order must be drawn up at Mr. *Cowper's* office, and is to be served on the opposite side.

When the transcript is brought into the house, may move to assign.

Or the defendant in error may petition the house for his purpose, and the order will be upon reading the petition, that he is required on or before next at of the clock in the forenoon to assign errors; or otherwise the transcript of the judgment be remitted, to the end that he may have execution, as if no error brought.

Or the defendant may petition.

If the error be not assigned within the time limited by the rule, the defendant in error, on applying to Mr. *Cowper's* office, may have a nonpros signed, and he is entitled to costs.

If error be not assigned in time.

If the plaintiff in error assign errors, it is to be drawn and signed by counsel, and ingrossed on a 4d. stamp paper, and filed in the parliament office. And that on assignment of errors, the plaintiff in error must get a

If plaintiff assign errors, how to proceed.

peer to move the house, that the defendant may appear and make his defence.

Joinder.

To the assignment of errors, the defendant may deliver to the like office, a joinder ingrossed on a 4d. stamp paper.

If plaintiff alleges diminution, a certiorari is to be issued in ten days.

If the plaintiff in error alleges diminution, and pray a certiorari, the same is to be issued without any motion, and to be returned in ten days; which if not done, or good cause shewn to the house to the contrary, the plaintiff will lose the benefit of his writ. 1 *Salk.* 267.

How to proceed to get a short day appointed. Not to be altered, but upon petition.

When the defendant hath joined in error, the cause is set down on the motion of a peer to be heard in term; after which, if the house be likely to get up soon, after assignment of errors, on pleading in *nullo est errorum*, the clerk in parliament will get a peer to move the house to appoint a short day for hearing of the cause; and when a day is appointed, the same cannot be altered, but upon petition: and no petition can in such case be received, unless two days notice thereof be given to the adverse party, of which oath is to be made at the bar of the house. See the order, 22d December, 1703.

Cases must be drawn up, and signed by counsel, and printed.

Previous to the argument, the cases must be drawn up and signed by counsel on each side, containing a copy of the transcript, assignment, and joinder, &c. as reasons are assigned on each side, which are afterwards printed, and 250 on each side are delivered at the parliament office, two days before the hearing at the least, some of which are given to the lords, as also the judges; 300 on each side are generally printed. Counsel are to have their briefs in time delivered for argument; the lords examine the errors with the assistance of the judges, in all affairs of weight and nicety. On hearing, the lords either affirm or reverse the judgment; on which the clerk of the parliament draws a *remittitur* of the transcript of the record into the King's Bench, which is signed by counsel, and entered with the affirmance or reversal; and the court below award execution, &c.

Two counsel only on each side.

No more than two counsel can be heard on each side, 2 *Crompt.* 489. And if there be no argument, one of them moves for judgment or reversal.

If judgment below be given for the plaintiff, and deemed right, it need only be affirmed. *East India Company v. Todd*, 1788.

If the judgment of the court of B. R. be deemed er-

aneous, it is sufficient simply to reverse it. *Pugh v. Goodtitle, May 1787.*

The House of Lords give sometimes very large, sometimes very small costs, at their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below; and in order to mitigate them, the plaintiff sometimes will withdraw his errors. 2 *Burr.* 1097. And the practice is to give interest from the day of signing the judgment to the day of affirming it there, computed according to the current, not according to the strict legal, rate of interest. *Bodily v. Bellamy, ib.* Costs.

In a writ of error from the King's Bench to the House of Lords, only a transcript of the record is sent up; and when remitted, the King's Bench award the execution. *Vicars v. Haydon, Cowp. Rep.* 843. Only a transcript is sent to the House of Lords.

If judgment below was given for defendant upon demurrer, and the judgment be reversed, whereupon a writ of inquiry becomes necessary in such case, the House cannot award the writ, but the record is remitted to the King's Bench, for them to award the inquiry, and upon return thereof, to give final judgment. *Ibid.* If judgment be upon demurrer.

A writ of error in parliament may be non-prossed without carrying over the transcript to the court of error. *Maule and Selw.* 104.

Where a judgment is affirmed in the House of Lords, which a transcript of the record only is removed, it is necessary that the transcript should be remitted to the court of King's Bench, before the execution is issued, or at least before it is returnable; therefore apply for it at the parliament office, pay the fees, and file the same with Mr. White, in the treasury of the King's Bench. If affirmed.

Standing Orders of the House.

Ordered, that the plaintiffs in all writs of error after the records be brought in, shall speedily repair to the clerk of the parliament, and prosecute their writs of error, and satisfy the officers of this house their fees fully due, and shall assign errors within eight days after bringing in such writs with the records; and if the plaintiffs make default so to do, then the said clerk, if defendants in such writs require it, shall record that the plaintiff hath not prosecuted his writ of error, and that the house doth therefore award that such plaintiff Orders on writs of error in parliament.
Errors to be assigned in eight days or nonprossed and remittitur.

If diminution
alleged, and
certiorari
prayed.

shall lose his writ of error, and the defendant shall go without day, and that the record be remitted; and if in any writ of error the plaintiff shall allege diminution, and pray a *certiorari*, the clerk shall enter an award thereof accordingly; and the plaintiff may, before *in nullo est erratum* pleaded, sue forth the writ of *certiorari* in ordinary course, without special petition or motion to this house for the same; and if he shall not prosecute such writ, and procure it to be returned within ten days next after his plea of diminution put into this house, then, unless he shall shew good cause for the enlarging the time for the return of such writ, he shall lose the benefit of the same; and the defendant may proceed, as if no such writ of *certiorari* were awarded. *Ordo dom. procer. die Veneris, 13th Decemb. 1661.*

Certiorari to
go without
motion, and
be returned in
ten days,
or lose benefit
thereof, and
defendant to
proceed as if
none awarded.

No case to be
delivered, un-
less signed by
counsel.

That no person presume to deliver any printed cases to any lord, unless signed by one or more of the counsel who attended the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house. *Ordo dom. procer. die Martis, 19th April, 1698.*

No putting off
a day of hear-
ing, without
notice two
days and
oath made
thereof.

It is ordered, That when a day shall be appointed for the hearing of any cause, appeal, or writ of error, the same shall not be altered but upon petition; and that no petition shall in such case be received, unless two days notice be given to the adverse party, of which notice oath shall be made at the bar of this house. *Ordo dom. procer. die Mercur. 22d Dec. 1703.*

Certificates to
be given of
certioraris
being award-
ed concerning
writs of error.

That when diminution shall be alleged, and a *certiorari* prayed and awarded before *in nullo est erratum* pleaded, the clerk shall upon request, give a certificate that diminution is so alleged, and a *certiorari* prayed and awarded thereupon. *Ordo dom. procer. de Veneris, 21st Feb. 1710.*

How counsel
are to proceed
on argument.

That at the hearing of causes, one of the counsel for the appellants shall open the cause, then the evidence on their side shall be read, which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents shall be heard, and one counsel only for the appellants to reply. *Ordo dom. procer. die Sabbat. 2 Mart. 1727.*

Error doth not
determine by
dissolution or
prorogation.
T. Raym. 382.

That in all cases of appeals and writs of error, they continue and are to be proceeded on in *statu quo*, as they stood at the dissolution of the last parliament. *Die Martis, 18 Mar. 1678-9.* So by prorogation, 2 *Lev. 93.* *Contra Carth. 237.*

Ordered, That in all cases of appeal, or writs of error appointed to be heard, the appellants and respondents, the plaintiffs and defendants, or their respective agents or solicitors, do deliver to the clerk of the parliament, or clerk assistant, to be distributed to the lords of this house, the printed cases upon such appeals or writs of error at least two days before hearing; and that no other or different cases in any such causes, be at any time afterwards printed or delivered. 18th Dec. 1724. Printed cases to be delivered.

All appeals not determined in the same session, shall be heard and determined in the beginning of the next session, in the same order as they shall stand to be heard at the end of this or any other session, without any new application to the house to appoint a day for hearing the same: and that such of the said appeals as shall stand first to be heard at the end of this or any other session, shall stand to be heard on the first *Monday* after the first day of the next session or meeting of parliament, the second upon the *Wednesday*, the third upon the *Friday* following, and from thence the rest in course upon every *Monday*, *Wednesday*, and *Friday* until they shall be heard and determined. 5th April, 1734. Appeals to be heard in course as they stand appointed.

Ordered, That on the days causes are appointed to be heard, the cause be the first business proceeded on after prayers, and no other business to intervene. 28th June, 1715.

Afterwards, that is to say, on the day of in the 57th year of the reign of our sovereign lord *George* the third, king of the united kingdom of *Great Britain* and *Ireland*, before our said lord the king, and the peers of this realm, in this present parliament at *Westminster*, in the county of *Middlesex* assembled, comes the said A. by J. K. his attorney, and says, that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, as in other assignments exactly. To be engrossed on a 4d. stamp parchment, and delivered to the clerk in parliament, signed by counsel. Assignment of general errors in the House of Lords.

And the said B. by his attorney comes Joinder. and says, that there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid: and he prays that the court of our lord the king in his parliament here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid

may be in all things affirmed, &c. but because our said lord the king in his parliament aforesaid, is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the said parties here, until wheresoever, &c. to hear their judgment thereon; for that the court of our said lord the king, in his parliament aforesaid, is not yet advised thereof, &c.

A test. fi. fa.
in case on a
judgment
affirmed in
parliament.

George the third, &c. To the sheriff of *Middlsex*. greeting: whereas we lately commanded our sheriffs of *London*, that they should cause to be made of the goods and chattels of C. D. late of Esq. the sum of

l. which A. B. Esq. lately in our court before us at *Westminster*, by our writ, and by the judgment of the same court, recovered against the said C. D. for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. was convicted, as appeared to us of record in our said court before us, and also

l. which to the said A. B. in our court of parliament, according to the form of the statute lately made and provided, were adjudged for his damages, costs and charges, which he had sustained on occasion of the delay of the execution of the judgment aforesaid, on pretence of prosecuting our writ of error brought thereupon by the said C. D. against the said A. B. the said judgment being in our said court of parliament in all things affirmed: whereof the said C. D. is also convicted, as by the inspection of the record and proceedings thereof remitted from our said court of parliament into our court before us, appears likewise to us of record, and that our said sheriffs of *London* should have the aforesaid monies before us at *Westminster*, at a certain day now past, to render to the said A. B. for his damages, costs, and charges, aforesaid: and our said sheriffs of *London* have returned to us, that the said C. D. had not any goods or chattels in their bailiwick, whereof they could cause to be levied the said damages, costs, and charges aforesaid, or any part thereof; whereas it is sufficiently testified in our said court before us, on the behalf of the said A. B. that the said C. D. hath sufficient goods and chattels in your bailiwick, whereof you can cause to be levied the said damages, costs, and charges aforesaid, and every part thereof: therefore we command you, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made the aforesaid sums of

1. and 1. for the damages, costs, and charges aforesaid, and that you have the said monies before us, on wheresoever, &c. to render to the said A. B. for his said damages, costs, and charges aforesaid; and have you there also this writ. Witness *Edward Lord Ellenborough*, at *Westminster*, the day of in the 52d year of our reign. *Law and Markham.*

When the Writ of Error abates.

A writ of error may abate by the act of God, the act of the law, or the act of the party.

If plaintiff in error dies, before errors assigned, the writ abates; and the defendant in error may thereupon sue out a *scire facias quare executionem non*, to revive the judgment against the executors, &c. 2 *Crompt.* 401. 7 *East*, 270. If plaintiff in error dies.

It does not abate by the death of the defendant in error, whether it happen before, or after errors assigned. 1 *Salk.* 264. If defendant dies before or after error assigned.

If there be several plaintiffs, and one dies, the writ shall abate, 11 *Co.* 135. 1 *Vent.* 34. 1 *Salk.* 261. before errors assigned. But if there be several defendants in error and one dies, it is otherwise. 1 *Ld. Ray.* 439. 1 *Salk.* 264. In this case the death being suggested on the roll, the writ proceeds against the survivors. If several plaintiffs, and one die.
If several defendants.

By the death of the chief justice, it is said, before he has made or signed his return, the writ becomes ineffectual, and the defendant in error by leave of the court, may take out execution. *Barnes*, 201. See 1 *Keb.* 658. By death of C. J.

Bankruptcy is no abatement. 1 *T. R.* 463.

If there are several plaintiffs, and one dies, the writ shall abate. 11 *Co.* 135. 1 *Vent.* 34. 1 *Salk.* 261. 1 *L. Ray.* 244. Contra if there be several defendants. *Ld. Ray.* 439.

The plaintiff in error married, whereby her writ abated; Marriage court gave defendant leave to take out execution without time to bring error *coram vobis*. 2 *Str.* 1015. *Jenkins v. Bates.*

A writ of error was allowed in parliament, and before it was returned and certified, the plaintiff in error died, execution issued without leave of the court. Motion to set it aside, and the rule was made absolute. *Lord Kin.* If plaintiff in error died, error dies.

naird v. Lyal, 7 *East*, 296. See 1 *Ld. Raym.* 244. *Barn.* 201. *Carth.* 404. 1 *Salk.* 319. And in this case the court refused leave for the plaintiff here to issue a *testatum, fi. fa.* tested in the last term, on the return day of the original *fi. fa.* which was after the allowance and service of the writ of error. *Ibid.*, 237.

If errors are assigned before defendant in error's death, the executor must proceed as if defendant was living, till judgment is affirmed, and then revive by *scire facias*; but cannot take out execution pending the writ of error, *Barnes*, 432. *Wright v. Treweeke*.

Of a second Writ of Error.

Where a writ of error abates by the act of God, as by the death of the parties, or chief justice, or by the act of law, a second writ of error is a supersedeas of itself, 1 *Vent.* 353. without motion or leave of the court.

And after abatement or discontinuance of a writ of error *coram nobis*, no bail is requisite. 2 *Crompt.* 396. But this must be understood, where a second writ of error is brought after an abatement by the act of God, or of the law; for where error is granted for insufficiency, a writ of error *coram nobis*, is not a supersedeas of itself. 1 *Ld. Ray.* 151.

But the court on motion will order that upon bail being put in and justified within four days, further proceedings shall be staid on the judgment on the original action, until the error be determined. 2 *Ld. Ray.* 1404. *Carth.* 570.

But where the writ abates by the act or default of the party, a second writ of error brought in the same court is not a supersedeas of execution as the first is. 1 *Salk.* 263. as where plaintiff in error marries, or nonprosses his own writ, and execution may be sued out in these cases, without leave of the court. 8 *East*, 412. *Birch v. Triste*. But on a writ of error *coram nobis*, execution taken out without leave of the court, is irregular. *Say. Rep.* 166.

The case of *Birch v. Triste*, was where bail in error was required, the plaintiff failed in perfecting his bail, and nonprossed his own writ, the plaintiff sued out execution, without applying to the court for leave, and it was held regular. 8 *East*, 412. see 1 *Mod.* 285. 1 *Salk.* 263.

Of Costs in Error.

When the judgment is affirmed, or writ of error non-prossed, the defendant in error is entitled to costs, and damages, by stat. 3 H. 7. c. 10. & 19 H. 7. c. 20. By the former, it is enacted, that if any defendant, or tenant, against whom judgment is given, or any other that shall be bound by the judgment, sue before execution had, any writ of error, to reverse same, if the judgment be affirmed, or the error be discontinued in default of the party, or the plaintiff in error be nonsuited therein, the person against whom the writ of error is sued, shall recover his costs and damages for delay, by discretion of the justices before whom the writ of error is sued; see *Dougl.* 561. n. 5. As to the word *justice*, the other statutes recite the former, and enacts that it shall be thenceforth put in execution. Upon these statutes, costs and damages are recoverable, in error for delay of execution, though none were recoverable in the original action. 2 Str. 1084. Cro. Eliz. 617. 659.

If error be affirmed or non-prossed, double costs.

It appears that at common law no costs were given upon any writ of error. 1 Str. 617.

By the 13 Car. 2. c. 2. st. 2. c. 2. s. 10. If the judgment be affirmed, the plaintiff shall pay to the defendant in error his double costs. This statute does not apply where the defendant below obtains judgment upon a special verdict, 5 East, 545. *Bell v. Potts*. The statute is confined to cases where the judgment so affirmed, is for the plaintiff below.

Affirmance.

By 8 & 9 W. 3. c. 11. s. 2. If a verdict be given for the defendant in any action, &c. in any court of record, and the plaintiff shall sue any writ of error to annul the judgment, and the same shall be affirmed, or the writ of error be discontinued, or the plaintiff be nonsuit, the defendant shall have judgment to recover his costs against the plaintiff, and have execution for the same by *ca. sa., fi. fa., or elegit*.

If verdict be for defendant, &c.

A judgment for the plaintiff was given in the C. P. on a special verdict in assumpsit, which was reversed on error brought in the K. B.; it was held, that the defendant was entitled to his costs of the defence below, but to no costs of the writ of error. *Gildart v. Gladstone*, 12 East, 668. see *Carth.* 254. 1 Salk. 268. S. P.

Judgment for plaintiff on special verdict in assumpsit, reversed, on error brought, costs of defence, but none in error.

Same point on error in fact.

A judgment for plaintiff was reversed on error *in fact* brought by defendant; court held, that the plaintiff in error was entitled to costs in the original action, though not to the costs in error. *H. 40 Geo. 3. Tidd, 1101.*

Therefore upon the reversal of the judgment each party must pay his own costs, and so upon a bill of exceptions. *5 East, 49.*

Though no costs in original action, yet there must be costs in error.

Error of a judgment, on the statute of usury, on affirmation, it was held, that though no costs were given in the original action, yet the court declared that the defendant in error was entitled to the costs by the express words of 3 H. 7. c. 10. *Str. 1084. Ferguson v. Rawlinson qui tam. Cro. Eliz. 609. 1 Vent. 31.*

Exchequer must give double costs.

The court of Exchequer-chamber is bound to allow double costs to the defendant in error, on the affirmation of the judgment of the court of King's Bench. *Shepherd v. Mackreth, 2 H. B. R. 384.*

Executors.

If an executor brings error upon a judgment against his testator, and after affirmation moves to pay principal, interest, and costs, he shall not pay costs in error. *Str. 1072. Rep. temp. Hardw. 367. 1 Vent. 166. 1 Mod. 77.* But if after a *devastavit*, he brings error, he shall pay costs on affirmation. *Str. 977. Caswell v. Norman.*

Avowant not entitled to costs or interest.

An avowant is not a plaintiff within 3 H. 7. and is not entitled to costs or damages on the affirmation by a court of error of a judgment in his favour. *Curth. 122. 4 Mod. 7. 1 Salk. 25. 205. 10 East, 2. S. P.*

Costs on quashing.

Costs on quashing writs of error, are to be given in all cases. *Str. 606. 8 Mod. 305; 4 & 5 Ann. c. 16.* but on an amendment of the writ.

This court will not refer it to the master to tax plaintiff his costs in error, in parliament, on a judgment affirmed in error in *dom. proc.* without awarding costs, and remitted to this court, to the end that such proceedings may be had thereon, as if no such writ of error had been brought. *2 Maule and Selw. 204.*

Inrolling Deeds.

How to get a deed inrolled.

The deed intended to be inrolled must be taken to a judge; if it be a bargain and sale, one of the parties must acknowledge his execution of the deed, either in court or before a judge at his chambers; but if the deed requires the judge's fiat only, then the party need not

attend; the deed must be left with the judge, who with his own hand delivers it in court to the secondary, and orders him to inroll it; it may be done in term time, or in vacation.

To be inrolled, if a bargain and sale, within six months from the date, computing twenty-eight days per month. *The entry.*
2 Inst. 678.

As yet of the term of Saint Hilary, 57th Geo. 3. Witness
Edward Lord Ellenborough.

England (ss) " Be it remembered, that on the 6th day of November, in this same term, before the lord the king at *Westminster*, Sir—— knight, one of the justices of the lord the king, before the king himself, came into the court of the said lord the king, before the king himself, and recordeth, that on the (a) day of 1817, at Serjeant's Inn, in Chancery-lane, London, came A. B. in his proper person, and brought before the same justice then there, a certain indenture, which he acknowledged to be his deed; and prayed that the same indenture might be inrolled of record in the said court as his deed; which said indenture the aforesaid justice, by his own proper hands, hath now delivered into court here, to be inrolled in these words, to wit, This indenture (here insert the deed *verbatim*, copying every word, with the names of the parties, and making the following mark for seals, —, put the sealing and delivery with the witnesses' name also.) When copied and examined, these words are to be indorsed upon the deed :

The day it was delivered into court.

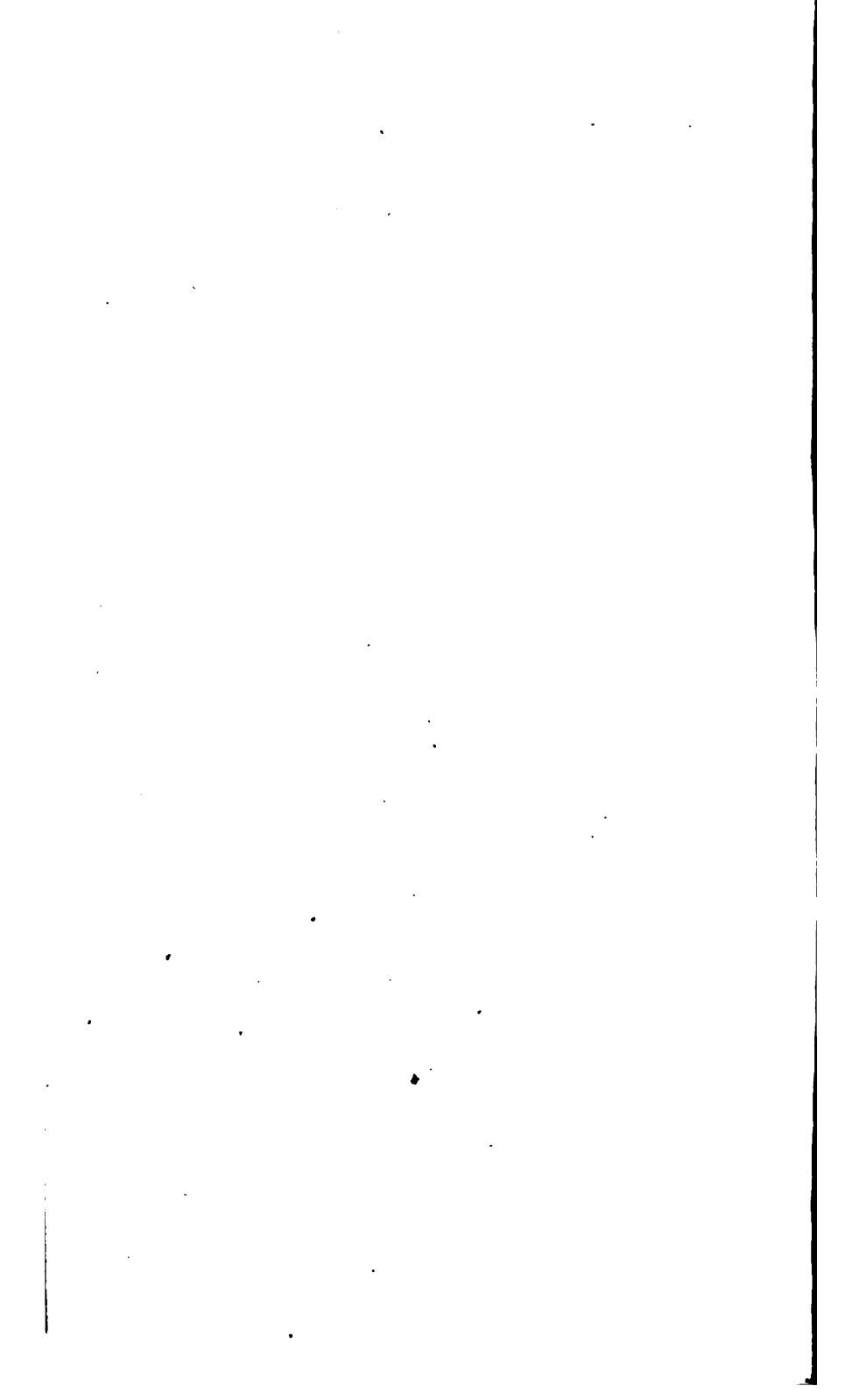
(a) The day of the acknowledgment of the deed.

" Inrolled in the court of our lord the king, before the king himself, of Hilary term, in the 57th year of the reign of king *George* the third." *Roll.* 563.

Then a docket of the deed is to be made upon a slip of paper in this form :

The entries of J. K. gentleman, one, &c. of the term of Saint *Michael*, 57th Geo. 3. 1817.

Middlesex (ss) Indenture of bargain and sale, dated the day of 1817, and made between A. B. of, &c. of the one part, and C. D. of, &c. of the other part, of ten messuages and six acres of land, with the appurtenances, in the parish of F. in the said county. *Roll.* 563.



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